No. _____

(CAPITAL CASE)

IN THE

Supreme Court of the United States

RODERICK NAPOLEON HARRIS,
Petitioner,

v.

TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

I. QUESTIONS PRESENTED

In *Strickland v. Washington*, this Court established its two-part test to determine whether representation is ineffective in violation of the Sixth Amendment: 1) whether the representation "fell below an objective standard of reasonableness"; and 2) whether the "deficient performance prejudiced the defense." 466 U.S. 668, 687-88 (1984). *Strickland* directed the courts to identify objective standards of care for counsel defending an accused individual. In a capital case, prejudice exists where there is a "reasonable probability" that the defendant would not have received a death sentence had counsel effectively presented available mitigation evidence. *Id.* at 695.

The questions presented are:

1. Whether a habeas court must articulate and apply prevailing professional norms in order to determine whether trial counsel's representation was ineffective in violation of the Sixth Amendment?

2. When trial counsel failed to investigate mitigating evidence, whether a habeas court can adequately assess the lawyers' performance and determine the existence of prejudice from a deficient performance by relying only on counsel's post hoc representations that they exercised their professional judgment or that further investigation would not have changed the outcome of the trial?

3. Whether the standard for identifying prejudice under Strickland is a "preponderance of the evidence," as held in this case, or is "reasonable probability" as articulated by this Court in *Strickland*?

This is a case where the defendant, Roderick Napoleon Harris, presented the only evidence about what the standard of care is. That evidence included the ABA and Texas Guidelines,[1] as well as expert testimony from an experienced local practitioner. The Texas Court of Criminal Appeals (CCA) rejected all of Harris's evidence about the standard of care, and failed to identify any standard of care at all. Instead, the CCA excused trial counsel's conduct because they purportedly relied on their "judgment."

It is undisputed that trial counsel here completely failed to investigate mitigating evidence: Before trial, Harris's trial counsel learned that his 17-year-old mother drank while pregnant, and knew that Harris was exposed to lead in utero and as a child. But trial counsel failed to investigate these issues. Trial counsel failed to develop a psycho-social history for Harris, which would have enabled them to discover that he was a severely neglected and abused as a child. Trial counsel also failed to investigate the State's false claim that Harris belonged to a violent street gang. Trial counsel only offered subjective, post hoc justifications for their decisions not to investigate.

The undisputed evidence now shows that Harris suffers from Fetal Alcohol Syndrome (FASD), has brain damage from lead exposure and FASD, was severely abused as a child and was not (as the State claimed) in a gang.

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[1] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 913 (2003); ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993); State Bar of Tex., Guidelines and Standards for Texas Capital Counsel, 69 TEX. B.J. 966 (2006); ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 677 (2008); State Bar of Tex., Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Death Penalty Cases (2015) (collectively the "ABA and Texas Guidelines").

II. RELATED CASES STATEMENT

- *The State of Texas v Roderick Harris*, No. F09-00409, In the Criminal District Court No. 7 of Dallas County, Texas. Judgment entered May 21, 2012.

- *Roderick Harris v The State of Texas*, No. AP-76,810, In the Court of Criminal Appeals of Texas. Opinion entered May 21, 2014.

- *Ex Parte Roderick Harris*, No. W09-00409-Y(A), In the Criminal District Court No. 7 of Dallas County, Texas. Order Entered March 31, 2020.

- *Ex Parte Roderick Harris*, No. WR-80,923-01, In the Court of Criminal Appeals of Texas. Order entered December 16, 2020.

- *Ex Parte Roderick Harris*, No. WR-80,923-01, In the Court of Criminal Appeals of Texas. Order for reconsideration entered January 27, 2021.

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VI. PETITION FOR A WRIT OF CERTIORARI

Roderick Harris respectfully petitions for a writ of certiorari to review the judgment of the CCA.

VII. OPINIONS BELOW

The CCA's unpublished opinion, Ex parte Roderick Harris, No. WR-80,923-01 (Tex. Crim. App. Dec. 16, 2020), accepting wholesale the trial court's Findings of Fact and Conclusions of Law, is in Appendix A. The trial court's Findings of Fact and Conclusions of Law, Cause No. F09-00409-Y (Criminal Dist. Ct., Dallas County, Texas Mar. 20, 2020), are in Appendix B. The CCA's denial of Harris's Suggestion for Reconsideration, WR-80,923-01 (Tex. Crim. App. Off. Not. Jan. 27, 2021), is in Appendix C.

VIII. JURISDICTION

The CCA issued its opinion affirming the trial court's decision on December 16, 2020. Appendix A. The CCA denied Harris's Suggestion for Reconsideration on January 27, 2021. Appendix C. Pursuant to the Supreme Court's March 19, 2020 Order, the 90-day deadline set forth in 28 U.S.C. § 2101(c) is extended to 150 days. This Court has jurisdiction under 28 U.S.C. § 1257(a).

IX. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Constitution's Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The U.S. Constitution's Fourteenth Amendment provides in relevant part: "No state shall . . . deprive any

person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV. The state statute that governs requests for habeas relief in Texas death-penalty cases, Texas Code of Criminal Procedure, article 11.071, is reproduced in Appendix D.

X. INTRODUCTION

Strickland directed habeas courts to identify the "prevailing professional norms" in trial counsel's locale at the time of trial and measure trial counsel's performance against those norms. 466 U.S. at 690; *see also Bobby v. Van Hook*, 558 U.S. 4, 14 (2009) (Alito, J., concurring) ("It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution."). Although the Court has declined to dictate the standards in every situation and location, the Court has mandated that the lower courts do that work. This rule makes sense. If the trial court does not identify the standard of care, it cannot determine if counsel's performance fell below it.

In his habeas hearing, only Harris presented the evidence on what the standard of care was at the time of trial. He presented expert testimony from a local practitioner, pointed to the ABA and Texas Guidelines for defending capital cases, and showed that trial counsel's performance undeniably fell below any of these standards. The CCA summarily rejected all these standards, but identified no alternative standard at all. The CCA instead said that trial counsel's failure to investigate was not deficient based entirely on trial counsel's subjective post hoc assertions that they did not investigate whether Harris suffered from FASD, lead

poisoning or childhood abuse because they used their judgment and did not think the jury would care. But *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington v. Richter*, 562 U.S. 86, 105, 110 (2011). The CCA completely failed to identify and articulate the relevant objective professional norms, or measure trial counsel's performance against objective norms.

The CCA found that trial counsel's performance was adequate based on the "heavy measure of deference to counsel's judgments" required by *Strickland*. But the CCA cannot defer to trial counsel's decisions as tactical if they have not investigated what evidence is potentially available. *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003).

This is a recurring problem in post-conviction cases in the lower courts. Citing *Van Hook*, courts reject the ABA standards as representing only guidelines, but then fail to articulate or apply any other standards. Courts frequently also reject qualified expert testimony opinion on local standards, as occurred here, leaving no identified standards at all. The courts then invariably rely on trial counsel's post hoc explanations to justify their conduct.

Trial counsel cannot exercise informed judgment where they have not actually done any investigation and do not know the facts. It is one thing to decide not to present evidence you know about, but a completely different thing to not present evidence you made no effort to find. This Court has repeatedly said trial counsel who fail to investigate are deficient.

The CCA also found that trial counsel's deficiencies did not prejudice Harris. The CCA again improperly accepted trial counsel's bald assertions that the issues they failed to investigate—Harris's FASD, lead poisoning, abusive childhood, and the falsity of the State's claim that Harris belonged to a violent gang—would have made no difference. The CCA also applied a preponderance of the evidence standard to the prejudice prong, in violation of *Strickland*'s less onerous "reasonable probability" standard—a recurring problem in state habeas courts.

Roderick Harris's case shows that this Court needs to revisit *Strickland* and reaffirm that a habeas court must articulate and apply prevailing professional norms. This is the only way to determine whether trial counsel's representation objectively deficient or not. Otherwise, habeas proceedings become outcome-oriented, inconsistent and unguided, with results turning on trial counsel's subjective rationalizations. Particularly in cases where trial counsel failed to investigate mitigating evidence, the habeas courts cannot rely on trial counsel's after-the-fact justifications claims that certain evidence would not have made a difference.

The Court also needs to clarify *Strickland*'s requirement that the standard of proof for prejudice is "reasonable probability," not "preponderance of the evidence" as the CCA held in this case. State and federal courts repeatedly ignore this dictate from *Strickland*.

XI. STATEMENT OF THE CASE

A. The Pre-trial Proceedings.

Roderick Harris was indicted for the shooting death of Alfredo Gallardo on March 17, 2009. Harris was represented at trial by court-appointed attorneys Brad Lollar, Doug Parks and Mike Howard. Lollar was appointed lead counsel on or about April 1, 2009. Roderick Harris's Proposed Findings of Fact and Conclusions of Law, Cause No. F-0900409-Y, In Criminal District Court No. 7 Dallas County, Texas, filed October 23, 2019 ("HPFFCL"), ¶28.[2] The State gave formal notice that it would seek the death penalty on August 24, 2009. HPFFCL, ¶34. Parks was appointed as second chair in June 2011. HPFFCL, ¶39. Howard joined the team in September of 2011, as third chair. HPFFCL, ¶31.

Lollar understood that the beginning of a case is the most critical time in preparing a defense, but the trial team did almost no work to prepare Harris's defense until nearly three years after Lollar's appointment. HPFFCL, ¶36. Trial began on May 7, 2012. Between April 1, 2009 and October 1, 2011, Lollar billed only 33 hours total—about 15 hours per year for the first two years of the case. Lollar did not begin reviewing witness videos until the end of March 2012. He did not review the record of the case until the beginning of April 2012. *Id.*

In the first two years after his appointment, Lollar spent only three hours with Harris. *Id.* He did not start an investigator working on the case until

[2] "HPFFCL" cites are supported by detailed citations to the habeas trial proceeding transcripts and the exhibits admitted in that proceeding.

December 19, 2010, when he retained Brendan Ross, and Antoinette McGarrahan, PhD, a neuropsychologist. *Id.*

Lollar claimed Howard was responsible for the mitigation case, though Howard denies it. HPFFCL, ¶38. Howard spent even less time working on Harris's case prior to the start of voir dire—20.9 hours—a little over one hour of work per week. Howard only spent 2.3 hours total meeting with Harris. *Id.*

Parks met with Harris for the first and only time on October 20, 2011, for only an hour-and-a-half. HPFFCL, ¶ 39. By the time voir dire started, Parks had only worked 21.9 hours on the case, which is fewer than four hours per month. *Id.* Trial was scheduled for May 7, 2012, and Parks did his first trial preparation on March 29, 2012, but then did no more work until April 9, 2012. *Id.*

In the two-year period after his appointment, Lollar spent only five hours consulting with his mitigation team, Ross and McGarrahan. HPFFCL, ¶40. Ross understood that a mitigation investigation must begin as soon as possible because "witnesses disappear," "memories fade," and "records get lost." *Id.* Yet Ross did not begin any work on the case until December 19, 2010, over a year after Harris's indictment and his attorneys were on notice that they needed to prepare a death-penalty mitigation case. *Id.*

The trial team knew that Harris had been exposed in utero to alcohol and lead, but the trial team did not investigate this as possible mitigation evidence. HPFFCL, ¶¶ 54-56. Lollar admitted that Harris's mother, Pamela Maddox, told him that, while she was pregnant, she drank. *Id.* Trial counsel also knew that

Harris and his mother had grown up next to the RSR lead Smelter in Dallas, and that their home was a Superfund site and had been subjected to massive environmental remediation due to toxic amount of lead in the soil and air. Counsel did not investigate Harris's lead exposure. HPFFCL, ¶¶ 132-34.

McGarrahan did not begin work on the case until July 1, 2011, over two years after Harris's attorneys were on notice that they needed to prepare a death-penalty mitigation case. *Id.* Trial counsel did not instruct McGarrahan to investigate whether Harris suffered from FASD. HPFFCL, ¶¶ 54-62. She was not qualified to make such a diagnosis and had never done so. *Id.* Likewise, trial counsel did not instruct McGarrahan to investigate whether Harris suffered from lead poisoning. HPFFCL, ¶¶ 132-34.

McGarrahan did some testing on Harris which she admits showed neuropsychological deficits. HPFFCL, ¶¶ 63-64. But she did not tell Harris's trial counsel what her conclusions and possible testimony were until a week after trial had already started. HPFFCL, ¶ 60-61. During trial, she wrote an email saying that she had nothing helpful to contribute at trial. *Id.* As a result, trial counsel called no expert to address any of Harris's neuropsychological deficits. HPFFCL, ¶¶ 63-64.

Trial counsel did not prepare any expert witnesses to testify until after trial had already started, and only then for a de minimis amount of time. HPFFCL, ¶ 41. Parks did not meet with the defense expert Dr. Kessner, whom he put on the stand at trial, until May 16, 2012—nine days after trial had already started. Parks

did not meet with defense experts Jim Aiken and Frank AuBuchon until May 17, 2019—ten days after trial began. *Id.* Parks prepared these two experts together in one meeting for about an hour. *Id.* None of these experts had ever met Harris. *Id.*

Harris's trial counsel knew he was in special education, public school records labeled him as having "Learning Disabilities/Emotional Behavior Disorders," he repeated a grade in elementary school, and dropped out in eleventh grade. HPFFCL, ¶¶ 163, 381-82. His school records show that he first started talking about killing himself as early as seven years old, a school psychologist diagnosed him with chronic depression, and he was diagnosed with ADHD. As a child, Harris talked about hearing voices. HPFFCL, ¶ 179. Yet trial counsel did not perform an MRI on Harris to determine whether he had brain abnormalities.

Trial counsel learned before trial that the State intended to tell the jury Harris was a gang member and present expert testimony on how dangerous gang members are. HPFFCL, ¶¶ 398-402. Trial counsel did not investigate the State's evidence, nor did they hire an expert to respond to it. *Id*

B. The Trial.

The jury convicted Harris of capital murder.

1. *The State's Punishment Case.*

In the punishment phase, the state claimed that Harris was a member of a violent street gang. HPFFCL, ¶¶ 398-402. The State offered photographs of Harris's tattoos taken in April 2012, about three weeks before trial. Harris's counsel did not object to these exhibits. *Id.* The State also presented testimony of Dallas Police Department Detective Barrett Nelson as a purported expert on gangs.

Id. Nelson said Harris's tattoos proved that Harris was a member of a dangerous gang, the "Fish Trap Bloods." HPFFCL, ¶¶ 398-402.

2. *Harris's Punishment Phase Defense and the Death Sentence.*

In response to the State's punishment phase case, Harris's trial counsel called four family members. *Harris v. State,* No. AP-76810, 2014 WL 2155395, at *4 (Tex. Crim. App. May 21, 2014). They said that Harris had ADHD and was in special education. *Id.* They claimed that when he was young, Harris "set a room of his family's house on fire," that his "mother, who suffers from manic depression and schizophrenia, gave him insufficient attention and affection," and that he helped to care for his two younger brothers and protect them from his parents' violence. *Id.* They said that Harris started using drugs when he was young. He became paranoid and heard voices when he used drugs. He has three children. *Id.*

The defense also called two experts, neither of whom was familiar with the record, had interviewed any witnesses or met Harris. HPFFCL, ¶ 146. Both specifically denied being asked to render an opinion about Harris himself, and only provided general information. *Id.* Dr. John Roache, a drug addiction expert, testified that drugs are addictive and explained how marijuana and PCP affect the body. *Id.* Dr. Gilda Kessner, a psychologist, testified that certain childhood risk factors can lead to later delinquent or violent behavior. *Id.*

The trial judge sentenced Harris to death.

C. The Habeas Proceeding.

Harris filed an application for writ of habeas corpus in Texas state court and the court ordered an evidentiary hearing on several claims, including whether Harris's trial counsel were deficient in failing to investigate and present in the punishment phase (i) evidence that he suffered from FASD, (ii) evidence that he was exposed to toxic levels of lead in utero and as a child, (iii) testimony from an expert explaining the mitigating impact of his life history, and (iv) testimony from a gang expert to rebut the State's evidence of Harris's involvement in a street gang.

1. *Harris's Mother Told Trial Counsel She Drank While Pregnant, and Trial Counsel Admitted They Did Not Investigate.*

Harris's mother drank Wild Irish Rose and Thunderbird "every weekend" during her first trimester.[3] HPFFCL, ¶ 55. Each of Harris's trial counsel testified that they were aware prior to the trial that Harris's mother drank alcohol while pregnant.

Harris's trial counsel admitted that they did not investigate whether Harris might have FASD. HPFFCL, ¶¶ 54-62. They did not instruct McGarrahan (or anyone else) to investigate this. They did not know whether McGarrahan was even qualified to diagnose FASD. Trial counsel knew she had never diagnosed FASD. Nor is she is not an expert in FASD. *Id.* Yet Lollar testified that he relied on McGarrahan to tell him whether he should investigate FASD, and she did not. *Id.*

[3] Wild Irish Rose and Thunderbird are wines "typically fortified to alcohol by volume content of about 13 to 18 percent . . . [and] substantially stronger than wine." HPFFCL, ¶ 55.

Trial counsel each admitted that at the time of Mr. Harris's trial in 2012, it was well-known in the in the legal community that an FASD diagnosis was a mitigating factor that could have spared Harris a death sentence. HPFFCL, ¶ 59. Lollar knew at the time of trial that there is no amount of alcohol that a pregnant woman can safely drink, especially in the first trimester. *Id.* McGarrahan also admitted that it was "well known in the community, and specifically the neuropsychological community, that any amount of alcohol can be problematic." *Id.* Lollar admitted that, had he investigated and found evidence of fetal alcohol spectrum disorder, he "would have put that on." HPFFCL, ¶ 62.

2. *Harris's Trial Counsel Knew that He Was Potentially Exposed to Lead Poisoning, Yet Failed to Investigate.*

All of Harris's trial counsel knew that Harris grew up next to the RSR lead smelter in Dallas and that it was a Superfund site. They did not hire a toxicologist to investigate whether Harris had damage from lead exposure. Lollar admitted that had he investigated and found evidence that Harris suffered from lead exposure, he would have presented that evidence at trial. HPFFCL, ¶ 132.

However, again, he claimed he relied on McGarrahan to tell him whether he should investigate lead poisoning, and she did not. He did not ask McGarrahan to investigate Harris's possible lead exposure, or whether she was qualified to do so.

3. *Harris's MRI Shows Significant Brain Damage.*

Habeas counsel had an MRI performed on Harris. HPFFCL, ¶ 100. Dr. Travis Snyder, a neuroradiologist, evaluated the MRI and discovered a cavum septum pellucidum, which is a space in the brain that ordinarily fuses shut when an

infant develops normally. *Id.* A cavum septum pellucidum in an adult signifies abnormal fetal brain development. *Id.*

Jeffrey David Lewine, Ph.D., a neuroscientist, explained that the MRI showed the brain was undersized: "Low volume were seen throughout the brain, but especially in temporal, parietal, and occipital regions, and also the left hippocampus. Low gray matter volume was additionally seen for bilateral cingulate regions." HPFFCL, ¶ 10-04. Dr. Lewine correlated Harris's small brain size to prenatal and childhood exposures to toxins such as alcohol and lead. *Id.*

Joseph Wu, M.D., a professor emeritus of Psychiatry and Human Behavior at the University of California, Irvine, analyzed the MRI and concluded that Harris showed significant brain abnormalities that "corroborate the presence of a damaged brain most likely due to lead toxicity, traumatic brain injury and in utero exposure to alcohol." HPFFCL, ¶¶ 104-05. With respect to alcohol exposure in particular, Dr. Wu noted that Harris's brain size was abnormally small and had a "smaller caudate volume . . . consistent with [the] finding that patients with fetal alcohol spectrum disorder show that caudate is among the regions [ ] most affected with approximately 16% volume reduction." HPFFCL, ¶ 105.

4. *Harris Suffers From FASD.*

Harris presented testimony from multiple experts that he has FASD. Dr. Julian Davies, a pediatrician and expert in FASD at the University of Washington Fetal Alcohol Spectrum Diagnostic Clinic, diagnosed Harris with Alcohol-related neurodevelopmental disorder (ARND), a form of FASD that has severe effects on executive function and cognitive abilities. HPFFCL, ¶¶ 44, 85-95.

Dr. Davies also studied Harris's childhood development and academic history, which presented "evidence of a complex pattern of behavior or cognitive abnormalities that are inconsistent with developmental level and cannot be explained by familial background or environment alone, such as learning difficulties; deficits in school performance; poor impulse control; problems in social perception; deficits in higher level receptive and expressive language; poor capacity for abstraction or metacognition; specific deficits in mathematical skills; or problems in memory, attention, or judgment." HPFFCL, ¶ 95.

Dr. Joan Mayfield has a Ph.D. in neuropsychology with a focus in children and has extensive experience diagnosing FASD. HPFFCL, ¶ 96. Dr. Mayfield testified that she reviewed the cognitive tests McGarrahan performed on Harris before trial, and that the results show significant impairment consisted with FASD. HPFFCL, ¶ 97. For example, his performance on the Wisconsin Card Sorting Test McGarrahan administered shows significant neurocognitive deficits. *Id.* Less than 1% of the population performs as poorly as Harris did. *Id.* The 15-point discrepancy between Harris's verbal IQ and performance IQ scores—the IQ "split"—is a significant red flag for FASD. *Id.* Harris's performance when McGarrahan administered the Wechsler Memory Scale, the California Verbal Learning test and the Rey-Osterrieth test showed significant evidence of FASD, as did his significant short-term memory deficits displayed by the test results. *Id.* Dr. Mayfield concluded that the tests that McGarrahan herself performed pointed to FASD, and

based on them she would have recommended trial counsel fully investigate FASD. HPFFCL, ¶¶ 98-99.

5. *Harris Has Brain Damage From Exposure to Lead.*

Harris called Thomas Dydek, Ph.D., a toxicologist, who testified about Harris's high levels of exposure to lead in utero and as a child. HPFFCL, ¶¶ 135-138. Harris and his mother both grew up in a Superfund site that the government ultimately remediated by removing the soil. HPFFCL, ¶ 367. As a child, Harris lived 2,000 feet downwind of the smelter, and where the dirt ultimately was removed in the 1990s because contamination levels were so high. HPFFCL, ¶ 127.

Dydek explained how fetuses in utero absorb lead from their mother. HPFFCL, ¶ 136. Habeas counsel had Harris's mother tested for lead contamination on October 23, 2018 at the Icahn School of Medicine at Mount Sinai Hospital in New York. The test showed that her bone-lead concentration was "approximately 30% greater than the average of the predictions of the concentration expected for someone her age." HPFFCL, ¶ 140. Habeas counsel attempted to test Harris for lead, but Texas would not allow him to be transported for the test. HPFFCL, ¶ 141.

6. *Harris's Psycho-Social History Shows Severe Abuse and Neglect.*

The trial team's investigator, Ross, admitted that preparation for the penalty phase of trial "requires extensive and generally unparalleled investigation into personal and family history." HPFFCL, ¶ 144. Yet the trial team did not create a social history for Harris. Ross admitted that the social history should have included any sexual or emotional abuse, family history of mental illness, domestic violence,

poverty, familial instability, neighborhood conditions, peer influences, traumatic events, and educational history. HPFFCL, ¶ 144.

Habeas counsel retained Dr. Laura Sovine, a clinical social worker and social historian, and she developed a psycho-social history for Harris. HPFFCL, ¶ 148. Her investigation uncovered that Harris was born in West Dallas to impoverished parents who were abusing alcohol and drugs, engaging in domestic violence, and mentally ill. HPFFCL, ¶ 149. Harris's mother has bipolar disorder, and was hospitalized three times for mental health issues. Harris's biological father, Eric Propes, has schizophrenia. *Id.*

Harris's mother gave birth to Harris at seventeen after drinking alcohol and smoking marijuana during her pregnancy. HPFFCL, ¶ 150. After his birth, his mother frequently left Harris with "a rotating cast of caregivers," "while she partied and struggled with her own mental health" and was "incapable of bonding with [Harris] . . . paying very little attention to him" and "struggling to connect." HPFFCL, ¶ 151. His mother did not "show much affection" to Harris; she did not hug him or tell him she loved him. *Id.*

Harris's biological father went to prison shortly after Harris was born. HPFFCL, ¶ 152. When Harris was three years old, his mother married Ramon Maddox, Sr. Maddox physically abused Roderick. *Id.* He frequently beat Harris, usually with a belt or extension cord. He sexually abused Harris. *Id.;* Applicant Roderick Harris's Objections To The Trial Court's Findings of Fact and Conclusions

of Law, In The Texas Court of Criminal Appeals Austin, Texas, Writ Cause No. WR-80,923-01, dated October 7, 2020 (accepted October 8, 2020), pp. 9-14.

As a child, Harris regularly witnessed Maddox physically abuse his mother. Maddox frequently beat and raped Ms. Maddox. HPFFCL, ¶ 153. The police were called to the Maddox home fifteen times. *Id.* Ms. Maddox would often flee to her sister's home bruised and bloody. *Id.*

Early in his life, Harris began showing many of the hallmark cognitive deficits and disabilities that happen when a child is exposed to alcohol in utero. HPFFCL, ¶ 154. Public school records identify him as having "Learning Disabilities/Emotional Behavior Disorders." HPFFCL, ¶ 163. He was in in special education classes until he dropped out of high school in eleventh grade. *Id.*

Starting at age seven, Harris repeatedly talked about killing himself. HPFFCL, ¶ 163. He reported hearing voices as a child. *Id.* He received no psychiatric care or medication. *Id.* He was diagnosed with ADHD but his parents did not allow him to take medications. *Id.*

By high school, Harris was self-medicating with illegal drugs. *Id.* When Harris was arrested for marijuana possession at school, the arrest report noted that "suitable supervision, care, or protection not provided by parent, guardian, custodian, or other person." HPFFCL, ¶ 160.

Harris struggled to make friends. Harris was frequently bullied and teased. When was 16, he self-reported as having "0 friends." HPFFCL, ¶ 163. Harris's parents and teachers treated his difficulty learning and depression as deviance and

rule-breaking rather than as signs of cognitive impairment. HPFFCL, ¶ 160. As he grew older, Harris's mother and stepfather disciplined him even more harshly, and he started to run away from home. *Id.*

Harris preferred jail to living in his abusive home. Harris was placed in detention at an emergency shelter, and he told his probation officer he wanted to be locked up as opposed to returned to his home. Harris dropped out of school before completing 11th grade and became "essentially homeless." HPFFCL, ¶ 163.

7. *Harris Did Not Belong to a Gang.*

At trial, the State told the jury that that Harris was in a gang based on a tattoo he had. The State called an expert, Detective Nelson, about how dangerous gangs are. In the habeas proceeding, Harris also offered undisputed evidence that Harris had no gang-related tattoos when he was arrested.

Had trial counsel investigated, they would have learned that Harris obtained the tattoos long after he was arrested and incarcerated. Trial counsel's files contained a photo of Harris taken May 12, 2009, right after Harris's arrest and three years before the start of trial. HPFFCL, ¶ 408. The photo shows that Harris did not have the tattoo that the State claimed proved he was a gang member. *Id.*

Had they investigated, trial counsel would also have learned that Harris's family denied he ever belonged to a violent gang, and that his juvenile record—including reports prepared by the Dallas County Juvenile Department and Dallas Police Department, as well as a report from "Concerned Citizens of Dallas," a Juvenile Department boot camp—repeatedly state that Roderick had no gang affiliation. HPFFCL, ¶ 406-09.

8. *Trial Counsel's Representation Fell Below Professional Norms in Texas.*

At the habeas hearing, Harris argued that all attorneys are bound by the prevailing professional norms specific to death penalty representation. One place these norms are documented is the ABA and Texas Guidelines. Under any prevailing norms for capital counsel and these guidelines, counsel must conduct "thorough and independent investigations relating to the issues of both guilt and penalty." *ABA Guidelines*, Guideline 10.7; *Texas Guidelines*, Guideline 11.1 (same). HPFFCL, ¶¶ 339-41.

Harris also called a capital-defense standard of care expert to establish the professional norms in Texas at the time of Harris's trial. Richard Burr has 40 years of experience representing clients sentenced to death in Texas. HPFFCL, ¶ 349. Burr testified that trial counsel's failure to investigate whether Harris suffered from fetal alcohol syndrome disorder, lead poisoning, and brain damage, and whether he belonged to a violent gang, fell below professional norms at the time of trial. HPFFCL, ¶¶ 349-50, 363-64, 423, 425. Burr explained that "Prenatal exposure to alcohol for many years, well before 2009, has been a big red flag." HPFFCL, ¶ 363. For a client with history of prenatal exposure to alcohol, a capital defense attorney must fully investigate the possibility of FASD as mitigating evidence and Burr would have done so here. *Id.*

Even if a neuropsychological exam "doesn't show much," a reasonable capital defense attorney must "keep looking, because that doesn't negate having fetal alcohol disorder, especially if you have certain exposure over a period of time during

the first trimester, which is when the brain is forming." HPFFCL, ¶ 364. "If . . . counsel is on notice that the defendant is living for a significant amount of time in a Superfund site that has been found to have toxic levels of lead," then he has "a duty under the prevailing norms to investigate that exposure." HPFFCL, ¶ 373. "[B]y 2009, the death penalty defense community had known for quite some time that exposure to environmental toxins—and the most prevalent environmental toxin is lead, especially for poor people who grow up where there's lead-based paint in housing projects that has flaked off and gotten into the soil, that type of exposure can be harmful, much less living in the shadow of a Superfund lead smelter site." HPFFCL, ¶ 373.

Burr testified that retaining a gang expert is "essential" because gang membership is "one of the highest impact facts there is." HPFFCL, ¶ 423. "[T]he mere mention of it gives rise to the fear and stereotyping that we all know is associated with it." *Id.* Burr also addressed trial counsel's failure to investigate whether Harris's tattoos were related to his membership in a violent gang. HPFFCL, ¶ 425. The evidence shows that Harris got the tattoos in jail after he was arrested and did not belong to a gang. Burr testified that prevailing professional norms would require trial counsel to investigate whether Harris acquired gang-related tattoos later, and why this occurred. *Id.*

D. The Habeas Adjudication.

After Harris presented his live testimony, the judge who heard the evidence left the bench before ruling. A new judge, who did not hear any testimony, signed the State's proposed findings of fact and conclusions of law verbatim, except that

the court deleted language that said the findings were based on the court's "personal knowledge and experience." Appendix B ¶¶502-505. The new judge did not hold any hearing or allow oral argument.

The CCA affirmed the trial court and adopted its findings. Appendix A. The CCA's opinion fails to identify prevailing professional norms for Harris's counsel in this capital case. The trial court rejected the ABA and Texas Guidelines because they "are not law, but guidelines of practice." Appendix B ¶ 172. The court also rejected Burr's testimony. Appendix B ¶ 184.

The CCA's opinion states that "[a] record that does not explain trial counsel's decisions will not show deficient performance 'unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" Appendix B Findings at 6–7 (citing *Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013) and *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012)). Applying this standard, the court concluded that trial counsel were not ineffective. The court justified this with the assertion that "[i]n an ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Appendix B at 28. Thus, CCA adopted trial counsel's subjective, post hoc testimony that "based on the information they had from Dr. McGarrahan indicating Applicant had little or no cognitive impairment," trial counsel exercised judgment to which the court just deferred. Appendix B ¶ 231. Trial counsel's complete reliance on

McGarrahan was the entire basis for the CCA's finding that trial counsel were not deficient.

In the alternative, the CCA found that trial counsel's ineffectiveness did not prejudice Harris. The court held the standard for showing prejudice was as follows: "An applicant asserting a claim of ineffective assistance of counsel has the burden to prove, by a preponderance of the evidence, that . . . the deficient performance prejudiced the defense such that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Appendix B at 26 (citation omitted).

With respect to prejudice, the CCA's findings again were based entirely on trial counsel's testimony that they believed that had they investigated the mitigating evidence offered by habeas counsel, it would not have made a difference because McGarrahan told them during trial that she did not believe the results of her examination could help their case.

Likewise, the CCA concluded that trial counsel's failure to investigate Harris's lead exposure did not prejudice his defense: "Because the expert testimony would have been, at best, that [Harris] Applicant may have been (more likely than not) exposed to lead, it is not reasonably likely the outcome of Applicant's trial would have been different even if counsel had presented evidence of childhood lead exposure in the punishment phase." Appendix B ¶ 234.

XII. REASONS TO GRANT THE PETITION

A. The Court Should Correct the CCA's Failure to Identify or Apply Any Professional Norms.

Strickland "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington*, 562 U.S. at 110. The lower court must identify the prevailing professional norms before it decides whether a potential justification for counsel's performance is objectively reasonable. *Strickland,* 466 U.S. at 688.

1. *The CCA's Failure to Apply Professional Norms Deprived Harris of Due Process.*

a. This Court requires habeas courts to determine and apply professional norms.

Strickland requires habeas courts to identify whether the representation "fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. Objective standards of reasonableness are the "professional norms" prevailing in the time and place of the trial. *See id.* "It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution . . . ." *Van Hook*, 558 U.S. at 14 (Alito, J., concurring). The courts must identify objective evidence of prevailing norms to ensure that courts undertake "an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington*, 562 U.S. at 105, 110.

Here, the CCA failed to identify objective standards of reasonableness. The CCA could not have determined whether trial counsel's performance was deficient by measuring their representation against "prevailing professional norms" in trial counsel's locale at the time of trial, as required by *Strickland*.

b. The CCA failed to apply or articulate any professional norms at all.

Harris offered the ABA and Texas Guidelines as evidence of professional norms. This Court has relied on the ABA standards to determine that the defendant's attorney's investigation of mitigating circumstances was deficient. *Rompilla v. Beard*, 545 U.S. 374, 389-90 (2005); *Wiggins*, 539 U.S. at 533; *Williams v. Taylor*, 529 U.S. 362, 396 (2000). The CCA rejected the ABA and Texas Guidelines, finding that "the ABA and Texas Bar Association guidelines are not law, but guidelines of practice." Appendix B¶ 172.

Harris also presented the testimony of expert Burr, who testified to the prevailing standards of care among local criminal defense counsel in Texas defending capital cases. Burr testified how trial counsel's performance fell below prevailing professional norms. Once trial counsel became aware that Harris's mother drank while pregnant with him, and that his mother and he were exposed to lead toxins from a lead smelter near their homes their entire lives, trial counsel should have fully investigated whether Harris suffered from FASD and lead poisoning. Habeas counsel undertook such an investigation, discovered that Harris suffers from FASD and lead poisoning, and obtained proof that he is afflicted with brain damage. Burr explained that evidence such as habeas counsel discovered and

developed here could have provided powerful mitigating evidence in the punishment phase. Burr testified that trial counsel should have investigated whether Harris really belonged to a violent gang. HPFFCL, ¶¶ 349-50, 363-64, 423, 425.

The CCA also rejected Burr's testimony. The reason the CCA gave was that Burr applied professional norms to the facts as he understood them, and this "moves beyond the scope of the standards of care recommended by the ABA and Texas Bar Association guidelines in a mitigation investigation to what Mr. Burr's personal recommendations might be under a set of facts." Appendix B ¶ 184. This was legally incorrect. Burr properly applied processional norms to the facts as he understood them—indeed, he properly addressed the ultimate issue. Texas Rule of Evidence 703, similar to the analogous federal rule, states that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed." Tex. R. Evid. 703. Further, Texas Evidence Rule 704 states that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Tex. R. Evid. 704.

The CCA here failed to identify or apply any prevailing norms at all, and therefore applied no objective standards at all to trial counsel's conduct.

c. The CCA improperly accepted trial counsel's post hoc justifications for their failure to investigate instead of the objective professional norms Harris offered.

The CCA completely failed to identify the prevailing norms against which trial counsel's representation were to be measured. Thus, the CCA failed to conduct "an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington*, 562 U.S. at 105, 110. Absent objective

standards supporting trial counsel's reasoning, there were only trial counsel's subjective post hoc assertions to support their decisions.

Trial counsel justified their failure to investigate on the fact that McGarrahan told them during trial that she had nothing to say that would help Harris. However, trial counsel did not instruct McGarrahan to investigate FASD or lead exposure, nor did they ask her whether she was qualified to investigate these conditions—and she was not qualified and had never investigated them. Trial counsel asserted they felt that reliance on family was sufficient and that they did not need an expert to explain the effects of Harris's horrific upbringing on his actions, or to refute the allegations that he belonged to a gang.

The CCA failed to articulate how these post hoc justifications satisfied any objective standards, and merely set an impossibly high bar for Harris: "A record that does not explain trial counsel's decisions will not show deficient performance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it." Appendix B Findings at 6–7 (citations omitted).

2. *Failure to Apply Professional Norms is a Recurring Problem in the Lower Courts.*

The CCA's failure to articulate and apply any prevailing norm is a consistent and recurring problem in post-conviction cases. The Court needs to correct these problems, or there will be no grounding in prevailing professional norms, no framework or assessing counsel's performance, inconsistencies and result-oriented outcomes. This Court undertook to correct a similar problem in *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017), holding that the CCA improperly relied on its own

"nonclinical" factors for determining mental disability, rather than the "medical community's diagnostic framework." Likewise, the Court needs to emphasize that trial counsel's performance must be measured through application of professional norms developed by lawyers experienced in representing capital defendants—whether offered through the ABA standards or expert testimony or other recognized sources for which there is a proper foundation.

This problem is not limited to this case; it is a recurring one. For example, in *Kemp v. Kelley*, 924 F.3d 489, 500–01 (8th Cir. 2019), the court without explanation rejected testimony from a legal expert that trial counsel's failure to investigate FASD while preparing the mitigation case and decision without expert advice to not purse the issue fell below professional norms. The expert testified that trial counsel's performance violated the *ABA Guidelines*, "which commentary states that counsel cannot adequately perform the necessary background investigation without the assistance of investigators and others." *Id.* The court held that the ABA standards are only guides, and accepted wholesale trial counsel's ex post explanation that he reasonably detected only "hints" but no "red flags" that his client was afflicted with FASD. *Id.* at 502.

In *Murphy v. Davis*, 737 F. App'x 693, 704–05 (5th Cir. 2018), the court rejected the defendant's argument that trial counsel was deficient because she failed to hire a qualified mitigation expert to investigate and present his background, instead hiring a psychologist the court admitted had no experience or training in preparing mitigation. The court also rejected the defendant's claim that

trial counsel was deficient in failing to hire the unqualified psychologist until two months before trial. The court recognized that *Wiggins* and the ABA standards formally recognized and reaffirmed a professional norm requiring trial counsel to rely on a qualified mitigation expert to investigate and help develop a presentation of the defendant's background. *Id.* But the court held that trial counsel was not deficient based entirely on trial counsel's post hoc explanations that she could not find a qualified mitigation expert and concluded that the psychologist would be good enough. *Id.* Trial counsel also asserted that she did not delay in hiring a mitigation expert because *Wiggins* was decided a few months before trial, and before *Wiggins* a mitigation expert was not the professional norm. *Id.* But *Wiggins* did not create a professional norm requiring a psychosocial history. *Wiggins* recognized a pre-existing professional norm of which trial counsel in *Murphy* should have been aware since her appointment. *Wiggins,* 539 U.S. at 524 ("standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report").

In *Anderson v. Kelley*, 938 F.3d 949, 964 (8th Cir. 2019), the court denied Anderson's claim that his trial counsel was ineffective for failing to investigate whether Anderson had FASD. As the dissent noted, "Anderson's lead mitigation attorney acknowledged the team 'did not consider the possibility that [Anderson] might have been exposed to alcohol in utero or that he suffered from fetal alcohol syndrome. . . . It just isn't something we considered one way or the other.'" *Id.* at 963-64. "The majority deflect[ed] blame from Anderson's attorneys by shifting focus

to the experts his attorneys retained and their failure to identify FASD." *Id.* at 964. Implicitly, the majority recognized that counsel's failure to dig deeper fell below the ABA standards, stating, "we emphasize, that the Supreme Court and this court have instructed repeatedly that the ABA Guidelines are 'only guides to what reasonableness means, not its definition.'" *Id.* at 958 n.3 (quoting *Van Hook*, 558 U.S. at 8 and citing *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (claiming the case holds that "imposing 'specific guidelines' on counsel is 'not appropriate'") (citation omitted)). But as the dissent noted, "[t]he experts did not have access to everything that counsel did and, more importantly, they lacked the most valuable evidence in this case—[the mother's] admission that she drank while pregnant—because counsel failed to uncover it. . . . When counsel fail to ask important questions and turn up crucial facts, that failure cannot be shifted to experts." *Id.* at 964; s*ee also* Emily Olson-Gault, *Reclaiming Van Hook: Using the ABA's Guidelines and Resources to Establish Prevailing Professional Norms*, 46 HOFSTRA L. REV. 1279, 1304 (2018) ("some [courts] have used [*Van Hook*] to disregard the [ABA] Guidelines entirely in their analysis of ineffective assistance of counsel claims," while not identifying any alternative norms).

What the case law shows is that, citing *Van Hook*, habeas courts reject the ABA standards as only guidelines, and then fail to articulate or apply any standards. These courts often also reject expert testimony on the local practice for no legally cognizable reason, as occurred here. The default "standard" is invariably trial counsel's post hoc explanations.

B. The CCA Should Not Have Given Trial Counsel Deference Because Trial Counsel Did Not Investigate.

1. This Court Has Reiterated that Absent Investigation, Courts May Not Defer to Trial Counsel's Judgment, but Habeas Courts Continue to Ignore this Direction.

This Court's precedents establish that where, as here, counsel failed to investigate issues that may have affected the jury's decision to impose a death sentence, the petitioner is entitled to relief. Absent investigation, there is no deference to trial counsel's decisions. In *Williams v. Taylor*, 529 U.S. at 372–73, the Court reversed because, as here, trial counsel failed to investigate Williams's childhood. The Court held that "even if counsel neglected to conduct such an investigation at the time as part of a tactical decision . . . tactics as a matter of reasonable performance could not justify the omissions." *Id.* at 373. Here, trial counsel admitted that had he known Harris suffered from FASD and lead poisoning, he would have presented the evidence. But he was unware of it because he did not investigate.

In *Rompilla*, 545 U.S. at 390–93, the Court reversed a death sentence because trial counsel had neglected to look in the file in Rompilla's prior conviction. *Id.* at 390-92. "If the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up." *Id.* at 390. These included his difficult childhood in urban poverty, his parents' and his own alcoholism, possible fetal alcohol syndrome disorder, and test results that showed mental illness and limited cognition. *Id.* at 390-91. When habeas counsel tested him, they found that

Rompilla suffered from organic brain damage. *Id* at 392. The Court acknowledged that under *Strickland*, it must give a "heavy measure of deference to counsel's judgments," but there was no judgment where counsel failed to investigate. *Id.* at 381, 392 (citation omitted).

Here, the Court should similarly hold. Trial counsel admit they did not investigate the mitigating evidence Harris's habeas counsel found, including evidence of Harris's brain damage. And they admit that if they had uncovered this evidence, they would have presented it. In *Wiggins*, 539 U.S. at 522-23, the Court expressly held that courts should defer to counsel's decisions not to investigate leads to potentially mitigating evidence *only* if they conducted a reasonable investigation into the defendant's background. *Id.* at 512 ("In deferring to counsel's decision not to present every conceivable mitigation defense despite the fact that counsel based their alleged choice on an inadequate investigation, the Maryland Court of Appeals further unreasonably applied *Strickland*.").

Recently, in *Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020), the Court reiterated that "to assess whether counsel exercised objectively reasonable judgment under prevailing professional standards, we first ask whether the investigation supporting counsel's decision not to introduce mitigating evidence of Andrus' background was itself reasonable." The Court reversed because habeas counsel had not conducted any investigation, and therefore his decision not to offer mitigating evidence deserved no deference. *Id.* at 1887. This situation is indistinguishable from the case at bar.

Courts are still deferring to counsel's judgment where they failed to investigate, even ignoring professional norms offered by petitioners. *See supra* at 25-28. The Court should grant this petition to clarify and reinforce that, under its precedents, trial counsel here deserve no deference.

2. Trial Counsel Cannot Offer Post Hoc Justifications and Claim they Made "Decisions" Where they Failed to Investigate.

The State courts denied Harris habeas relief solely on the principle of complete deference to trial counsel's decisions—even though trial counsel did not even undertake to investigate the mitigating evidence offered by habeas counsel. "[I]f a purportedly tactical decision is not preceded by a reasonable investigation, then it is not sufficiently informed and not entitled to the deference typically afforded counsel's choices." *Escamilla v. Stephens*, 749 F.3d 380, 392 (5th Cir. 2014) ("We reject[ ] any suggestion that a decision to focus on one potentially reasonable trial strategy. . . . [i]s 'justified by a tactical decision' when 'counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background[.]'") (citation omitted).

Here, as in *Williams*, *Rompilla*, *Wiggins* and *Andrus*, trial counsel did not deserve deference because they did not investigate. They were aware that Harris's mother drank while pregnant with Harris, and that he grew up in a Superfund site, but they failed even to investigate what is undeniably powerful mitigating evidence—fetal alcohol syndrome disorder and lead poisoning. Fetal alcohol syndrome disorder is "widely acknowledged to be a significant mitigating factor that reasonable counsel should have at least explored—as outlined in the ABA

Guidelines and caselaw at the time." *Williams v. Stirling*, 914 F.3d 302, 315 (4th Cir.), *as amended* (Feb. 5, 2019).

The CCA denied Harris habeas relief notwithstanding the evidence offered by habeas counsel that Harris has FASD and significant deficits because of lead poisoning, as verified by an MRI and accompanying expert testimony showing brain damage.

Trial counsel knew that the State would offer testimony that Harris belonged to a violent gang, including expert testimony interpreting his tattoos. Courts recognize gang evidence is highly prejudicial, and it is for this reason that they severely restrict use of gang evidence at trial. *See, e.g., United States v. Myers*, No. 4:08-CR-170-Y, 2009 WL 10679641, at *2 (N.D. Tex. Apr. 8, 2009) (evidence of gang membership is only allowed where it goes to some specific permissible purpose; for instance, where gang membership demonstrates involvement in the alleged conspiracy). Yet trial counsel did not investigate and therefore discover that the State's gang evidence was false. If they had investigated, they would have discovered that Harris has no significant gang history and he received the allegedly-incriminating tattoo long after the crime at issue.

Trial counsel also failed to develop a psycho-social history of Harris's life. The CCA's opinion claims that "[t]he ABA guidelines do not require that a trial team use expert testimony to present a defendant's social history to the jury." Appendix B ¶ 270. But whether or not the trial team uses an expert to present the psycho-social history, they must develop one and present it through lay or fact

witnesses. *See ABA Guidelines*, Guideline 10.11 cmt. (noting the importance of presenting "the client's complete social history" at punishment).

There is no question that at the time of Harris's trial in 2012, it was a professional norm for trial counsel to develop a psycho-social history of a criminal defendant, with help from an expert. In 2003, the *Wiggins* Court noted, "standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report." *Wiggins,* 539 U.S. at 524. As the Fifth Circuit has noted, immediately after *Wiggins*, if not before, all courts explicitly recognized preparation of a psycho-social history was a professional norm. *Murphy*, 737 F. App'x at 705; *see Wiggins*, 539 U.S. at 517 ("[A]t the close of the [habeas] proceedings, the judge observed from the bench that he could not remember a capital case in which counsel had not compiled a social history of the defendant, explaining, '[n]ot to do a social history, at least to see what you have got, to me is absolute error. I just-I would be flabbergasted if the Court of Appeals said anything else.'")

3. *The CCA Improperly Found No Prejudice Where Trial Counsel Failed to Investigate.*

Harris must also show that that trial counsel's deficient performance prejudiced him. *Andrus*, 140 S. Ct. at 1885. "Here, prejudice exists if there is a reasonable probability that, but for his counsel's ineffectiveness, the jury would have made a different judgment about whether [Harris] deserved the death penalty as opposed to a lesser sentence." *Id.* at 1885-86 (citing *Wiggins*, 539 U.S. at 536).

The CCA concluded there was no prejudice by relying on counsel's subjective post hoc assertion. Trial counsel testified they did not investigate because McGarrahan emailed them during trial that she could not provide helpful testimony regarding Harris's cognitive deficits. The court's logic was that because McGarrahan said that she had nothing helpful to say at trial, trial counsel's failure to investigate did not matter. The CCA ignored the undisputed record introduced by habeas counsel— MRI evidence that Harris had organic brain damage, Dr. Davies's diagnosis that he suffered from FASD, and Dr. Dydek's testimony that he was poisoned in utero and as a child by lead. The CCA did not address whether this evidence would have overcome McGarrahan's opinion in an email to trial counsel a week after trial began.

The State courts' finding of no prejudice is facially unbelievable and contrary to the law. The CCA should have assessed the prejudice prong based on the totality of the evidence. In assessing whether Harris showed that his trial counsel's ineffectiveness prejudiced him, "'the reviewing court must consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding.'" *Id.* at 1886 (quoting *Williams*, 529 U.S. at 397–398 and citing *Sears v. Upton*, 561 U.S. 945, 956 (2010) ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered [mitigation] evidence . . ., along with the mitigation evidence introduced during [the defendant's] penalty phase trial, to assess whether there is a reasonable probability

that [the defendant] would have received a different sentence after a constitutionally sufficient mitigation investigation." (citing cases)).

The CCA evaluated prejudice by focusing on the evidence offered by the prosecution at trial, and essentially ignoring the new, mitigating evidence presented by habeas counsel. However, courts must take account of all the evidence admitted in the habeas proceeding—the whole record. As this Court recently found in *Andrus*, a factually similar case:

> The record before us raises a significant question whether the apparent "tidal wave," 7 Habeas Tr. 101, of "available mitigating evidence taken as a whole" might have sufficiently "'influenced the jury's appraisal' of [Andrus'] moral culpability" as to establish Strickland prejudice, *Wiggins*, 539 U.S. at 538, 123 S. Ct. 2527 (quoting *Williams*, 529 U.S. at 398, 120 S. Ct. 1495). (That is, at the very least, whether there is a reasonable probability that "at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537, 123 S. Ct. 2527.) That prejudice inquiry "necessarily require[s] a court to 'speculate' as to the effect of the new evidence" on the trial evidence, "regardless of how much or little mitigation evidence was presented during the initial penalty phase." [*Sears*, 561 U.S. at 956]; *see also id.*, at 954, 130 S. Ct. 3259 ("We have never limited the prejudice inquiry under Strickland to cases in which there was 'little or no mitigation evidence' presented").

Andrus, 140 S. Ct. at 1887. In determining whether there is prejudice, the CCA should have considered the MRI showing brain damage, Dr. Davies's diagnosis that Harris suffered from FASD, Dr. Dydek's testimony that Harris suffered cognitive impairments as a result of lead exposure in utero as a child, and that the State falsely claimed that Harris was in a violent gang. The CCA also ignored Harris's tormented psycho-social history.

The CCA's error here is pervasive in the lower courts. *See e.g., Andrus*, 140 S. Ct. at 1887 ("Given the uncertainty as to whether the Texas Court of Criminal

Appeals adequately conducted that weighty and record-intensive analysis in the first instance, we remand for the Court of Criminal Appeals to address *Strickland* prejudice in light of the correct legal principles articulated in the case."); *see supra* at 25-28. Here, the CCA based its finding that there was no prejudice based solely on the subjective belief of trial counsel who did no investigation. Without the benefits of an investigation, trial counsels' subjective beliefs are inherently distorted. *Andrus*, 140 S. Ct. at 1885-86.

C. The State Courts Violated *Strickland* by Applying the Wrong Standard of Proof for Prejudice.

In addressing the prejudice prong, the CCA deprived Harris of due process because it held him to a standard of proof higher than *Strickland* prescribes. The CCA held the standard for showing prejudice was as follows: "An applicant asserting a claim of ineffective assistance of counsel has the burden to prove, by a preponderance of the evidence, that . . . the deficient performance prejudiced the defense such that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Appendix B at 26 (citing *Strickland*, 466 U.S. at 694; *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012)).

But "*Strickland* held that to prove prejudice the defendant must establish a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different;' it specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered." *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002).

"Reasonable probability" to prove prejudice is a less of a burden than a preponderance of the evidence. *See Strickland*, 466 U.S. at 694 (holding that prejudice can be shown "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome"); *accord Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) ("[A] reasonable probability that . . . the result of the proceeding would have been different . . . does not require demonstration by a preponderance.") (citations omitted).

The federal circuits disagree about the correct standard. Fifth Circuit courts continuously apply the preponderance of the evidence standard to the prejudice prong, in blatant violation of this Court's holdings, while other circuits disagree. *See, e.g., Rector v. Johnson,* 120 F.3d 551, 563 (5th Cir. 1997) ("Rector bears the burden of proving both prongs [of *Strickland*] by a preponderance of the evidence."); *Randoff v. United States*, No. 9:13cv289, 2014 WL 12815048, at *1 (E.D. Tex. Oct. 27, 2014) ("Mere allegations of prejudice are insufficient; the movant must affirmatively prove by a preponderance of the evidence that he was prejudiced as a result of counsel's deficient performance."), *report and recommendation adopted* 2017 WL 3599539 (E.D. Tex. Aug. 21, 2017); *Hebert v. Rogers*, 890 F.3d 213, 229 (5th Cir. 2018) ("In order to prevail on a claim for ineffective assistance of counsel, a party must prove—by a preponderance of the evidence—her counsel performed deficiently and that deficient performance caused her prejudice.") (Steward, J., concurring); *compare Ellis v. Harrison*, 947 F.3d 555,

559 (9th Cir. 2020) (finding error where the lower court required the defendant to show prejudice by a preponderance of the evidence) (Nguyen, J., concurring).

The problem is epidemic in the state courts, including in the highest courts of Texas (as here), California, Iowa, Pennsylvania, Minnesota and Oregon. *E.g., People v. Centeno*, 60 Cal. 4th 659, 674, 338 P.3d 938, 950 (Cal. 2014) (a defendant alleging ineffective assistance of counsel "bears the burden of showing by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice"); *State v. Smothers*, 590 N.W.2d 721, 722 (Iowa 1999) ("To establish ineffective assistance of counsel, Smothers must prove, by a preponderance of the evidence, both that his trial counsel failed to perform an essential duty and that prejudice resulted from the failure."); *Commonwealth v. Lassiter*, 554 Pa. 586, 592, 722 A.2d 657, 660 (1998) ("A criminal defendant sustains a claim of ineffectiveness of counsel by proving by a preponderance of the evidence: (1) that the underlying claim is of arguable merit; (2) that counsel's performance had no reasonable basis; and (3) that counsel's ineffectiveness worked to his prejudice."); *State v. Vick*, 632 N.W.2d 676, 688 (Minn. 2001) ("The second prong of the test, prejudice, requires a defendant to show by a preponderance of the evidence that counsel's errors so prejudiced the case that a different outcome would have resulted but for the errors."); *Lichau v. Baldwin*, 333 Or. 350, 359, 39 P.3d 851, 856 (2002) ("To prevail, petitioner must demonstrate, by a preponderance of the evidence, that McCrea failed to exercise reasonable

professional skill and judgment, and that petitioner suffered prejudice as a result."); *Ex parte Wolf*, 296 S.W.3d 160, 168 (Tex. App. 2009) ("To establish ineffective assistance of counsel, Wolf had to prove by a preponderance of the evidence in the court below that (1) Devlin's representation fell below an objective standard of reasonableness; and (2) Devlin's deficient performance resulted in prejudice to the defense."); *State v. L.A.*, 433 N.J. Super. 1, 13, 76 A.3d 1276, 1283 (App. Div. 2013) ("It is well-settled that to set aside a conviction based upon a claim of ineffective assistance of counsel, a petitioner must prove, by a preponderance of the evidence, that (1) counsel performed deficiently, and made errors so serious that he or she was not functioning as counsel guaranteed by the Sixth Amendment; and (2) defendant suffered prejudice as a result."); *Overall v. State*, No. 88-215-III, 1988 WL 138228, at *1 (Tenn. Crim. App. Dec. 28, 1988)

("When the petitioner seeks to vitiate a conviction on the ground that counsel's representation was ineffective, the petitioner must establish by a preponderance of the evidence (a) the services rendered or advice given by counsel fell below "the range of competence demanded of attorneys in criminal cases . . . and (b) the unprofessional conduct of counsel enured to the prejudice of the petitioner.").

XIII. CONCLUSION

The Court should grant the petition, vacate the order below, and remand this case with instructions to identify and apply professional norms, consider the mitigating evidence, reassess the prejudice prong in light of that mitigating evidence, and apply a reasonable probability, not a preponderance standard to assess prejudice.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-80,923-01

EX PARTE RODERICK HARRIS, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. F-0900409-Y IN CRIMINAL DISTRICT COURT NO. 7 DALLAS COUNTY

Per curiam.

O R D E R

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

In May 2012, a jury convicted Applicant of the capital murder of Alfredo Gallardo in the course of committing or attempting to commit robbery. *See* TEX. PENAL CODE § 19.03(a)(2). The jury answered the special issues submitted under Article 37.071 of the

Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death.[1] This Court affirmed Applicant's conviction and sentence on direct appeal. *Harris v. State*, No. AP-76,810 (Tex. Crim. App. May 21, 2014) (not designated for publication).

In his application, Applicant presents six claims challenging the validity of his conviction and sentence. The trial court held an evidentiary hearing, entered findings of fact and conclusions of law, and recommended that we deny the relief that Applicant seeks.

We have reviewed the record regarding Applicant's allegations. Some of his claims are multifarious and overlapping. In Claims 1 and 2, Applicant argues that counsel were ineffective for failing to introduce certain mitigating evidence, including:

- Expert testimony to show that he has suffered permanent brain damage due to Fetal Alcohol Spectrum Disorder and toxic lead exposure;
- A social worker to explain how his childhood experiences influenced his behavior;
- A gang expert to rebut the State's gang expert and to place in context Applicant's past involvement in a youth gang; and
- An expert to discuss the "school to prison pipeline."

In Claim 3, Applicant argues that his counsel were ineffective for failing to object to testimony that he was wearing a stun belt when he was inadvertently allowed to ride unsupervised in an elevator. In Claims 4 and 5, Applicant faults defense counsel's decision not to object—and appellate counsel's decision not to bring a claim—regarding testimony and evidence about:

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[1] Unless otherwise indicated, all references to "Articles" refer to the Texas Code of Criminal Procedure.

- The fatal injuries Applicant inflicted on Carlos Gallardo, Alfredo Gallardo's brother, during the same criminal transaction;
- First responders' efforts to save Alfredo Gallardo;
- The fact that Applicant shot at responding officers as he tried to escape;
- Items found in a car that was parked at the scene of the crime; and
- Applicant's booking sheet which listed the car's license plate.

Applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of these proceedings would have been different but for counsel's deficient performance. *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland*, 466 U.S. at 688).

In Claim 4, Applicant additionally alleges that he was denied due process by trial counsel's failure to object—and the trial court's overruling counsel's pretrial evidentiary objections—to the admission of forensic evidence regarding the death of Carlos Gallardo. Applicant killed Carlos Gallardo during the same robbery in which he killed Alfredo Gallardo. He fails to demonstrate that the trial court or trial counsel erred. *Cf. Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011) ("Evidence of another crime, wrong, or act also may be admissible as same-transaction contextual evidence where 'several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony . . . of any one of them cannot be given

without showing the others.'") (citations omitted); *see also Sonnier v. State*, 913 S.W.2d 511, 519 (Tex. Crim. App. 1995) ("[W]hen the power of the visible evidence emanates from nothing more than what the defendant has himself done we cannot hold that the trial court has abused its discretion merely because it admitted the evidence."). Similarly, Applicant has not demonstrated that a due process violation resulted from counsel's decision not to object to the forensic evidence enumerated in Claim 5.

Applicant's constitutional challenge in Claim 6 to Article 37.071's "10-12 Rule" is not cognizable on habeas review and lacks merit; he raised a similar claim on direct appeal and we have previously rejected such challenges. *See Ex parte Hood*, 304 S.W.3d 397, 402 n.21 (Tex. Crim. App. 2010) ("[T]his Court does not re-review claims in a habeas corpus application that have already been raised and rejected on direct appeal."); *see also Smith v. State*, 297 S.W.3d 260, 278 (Tex. Crim. App. 2009) (rejecting the argument that the "10-12 rule" violates the Eighth Amendment principles discussed in *Mills v. Maryland*, 486 U.S. 367 (1988), and that the trial court violated the defendant's constitutional rights "by instructing the jury in this manner"). Applicant also argues in Claim 6 that the statutory instructions misled at least one juror, offering a juror's affidavit in support. The affidavit describes the juror's deliberative process and purports to convey aspects of the group's deliberations. Her affidavit is not competent, admissible evidence here. *See* TEX. R. EVID. 606(b).

We adopt the trial court's findings of fact and conclusions of law.[2] Based upon the

[2] We note that, in Findings 264, 355, and 365, the habeas court refers to "the capital

(continued...)

trial court's findings and conclusions and our own review of the record, we deny relief.

IT IS SO ORDERED THIS THE 16TH DAY OF DECEMBER, 2020.

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(...continued)
murder of Carlos Gallardo," instead of the capital murder of *Alfredo* Gallardo. This appears to be a clerical error and does not affect the validity of the court's findings.

APPENDIX B

Cause No. W09-00409-Y(A)

In Criminal District Court No. 7 of Dallas County, Texas

Trial Court Cause No. F09-00409-Y

EX PARTE RODERICK HARRIS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Having considered the original application for writ of habeas corpus; the State's answer; official court documents and records from the trial, direct appeal, and these writ proceedings; evidence presented at the hearings conducted on May 29, 2018 through June 1, 2018, July 16, 2018, and September 10 through 12, 2018; other filings by the parties in this writ proceeding; the Court makes the following findings of fact and conclusions of law.

BACKGROUND FACTS

Applicant was convicted and sentenced to death for the March 17, 2009 capital murder of Alfredo Gallardo committed in the course of a home-invasion robbery.

Alfredo and Maria Carmin Gallardo lived in a mobile home in east Dallas with their children and Alfredo's brother, Carlos Gallardo. (RR58: 31-32, 36, 38, 56-57, 126; SE 1-5).[1] On the evening of March 17, 2009, Alfredo, his wife Maria, brother Carlos, sons Omar and Jair, daughter Yahaira, and grandson Martine Junior were at home. (RR58: 61, 63-64, 67-68, 133). As Alfredo started to exit the front door at nine o'clock p.m. to check on his daughter who was at a friend's home, Applicant forcefully pushed the door open and pointed a gun at Alfredo's head. (RR58: 77-79, 126-128). Thirteen-year-old Yahaira attempted to retreat with her younger brother and nephew into her parents' bedroom, but Applicant called out to her, demanding, "Come here, bitch." (RR58: 55-56, 77, 80-83, 128-129). While he spoke, Applicant pointed the gun at the family. (RR58: 83). He forced Alfredo and Carlos to sit on

[1] Throughout these findings and conclusions, "RR" refers to the reporter's record on direct appeal. "CR" refers to the clerk's record on direct appeal. "SE" refers to the State's exhibits admitted at trial. "DE" refers to Applicant's exhibits admitted at trial. "WRR" refer to the reporter's record in these writ proceedings. "Application Exh." refers to Applicant's Exhibits numbered 1 through 28 attached to his original writ application (this includes the affidavit of Dr. Julian Davies, filed February 23, 2015, and identified as Exhibit 28). "WRR State's Exh." refers to the State's exhibits 1 through 17 admitted during the writ hearing. "WRR Applicant's Exh." refers to Applicant's exhibits 1 through 15 admitted during the writ hearing. Other reports and affidavits filed by the parties with the court's permission in this proceeding, but not admitted with exhibit numbers, are identified using the author's or affiant's last name.

the sofa, and demanded money and jewelry. (RR58: 77, 79, 82, 130). Yahaira translated Applicant's demands into Spanish for her parents and uncle. (RR58: 83-84, 87, 144). She told Applicant the family did not have any money. (RR58: 130, 132).

Alfredo and Maria's adult son Omar was in his bedroom watching television. (RR58: 39, 42). Omar heard his father speaking in a panicked voice. (RR58: 39). He peeked out, saw the robbery in progress, exited the home through his bedroom window, and sought assistance from the mobile home park security guard. (RR58: 30-31, 39-43, 47, 50-51, 135). The security guard called 911 and reported the robbery. (RR58: 31, 35, 43-44; SE 6, 6A).

Meanwhile inside the home, Yahaira gave Applicant a two-dollar bill from her mother's purse. (RR58: 84, 131). Applicant demanded the men's wallets, and struck both in the face with the gun. (RR58: 85-86, 128-130). At gunpoint, Applicant forced Alfredo and Carlos to lie face down on the living room floor and took their wallets. (RR58: 87-89, 129-130). Applicant herded the family from the living room through the master bedroom and bathroom, forcing them into the master closet. (RR58: 89-90, 93-94, 131-133). He repeatedly asked for money, jewelry, or drugs. (RR58: 90-91, 130, 132, 134). He also asked for the keys to the red truck parked outside the house; Yahaira lied and told him her brother had the keys and was at a party. (RR58: 98; SE 98-99, 134). The family did not have any drugs on the premises. (RR58: 111). Applicant was angry the family did not have any money. (RR58: 132-133).

As they went through the master bedroom, Yahaira handed Applicant a case containing some jewelry; Applicant removed a necklace and two rings. (RR58: 90- 92, 118; SE 20, 21). In the closet, Applicant tied Alfredo's hands with a belt and made Yahaira tie her uncle's hands. (RR58: 94-95, 136). Yahaira believed Applicant was going to kill them. (RR58: 95). While the family was in the closet, they heard Applicant searching the bathroom cabinets and yelling. (RR58: 96-98, 133; SE 19).

Applicant returned, pointed the gun at Maria, and started to take her out of the closet. (RR58: 100-101, 134). When Maria cried and prayed for him not to take her, Applicant pulled on Yahaira instead, starting to remove her from the closet. (RR58: 101, 136). Applicant was angry. (RR58: 136). Maria was hysterical, and he threatened to kill them one-by-one if Maria did not calm down. (RR58: 102, 134- 135, 144-145).

Applicant then pointed the gun at Alfredo and grabbed his shirt, pulling him out of the closet and into the adjacent bathroom. (RR58: 101-103, 136, 148-149). Carlos followed. (RR58: 104, 116, 137). Applicant and Alfredo fell into a large Jacuzzi tub, and Applicant began shooting. (RR58: 102-103, 113-116).

Applicant shot Alfredo first. Yahaira saw Applicant push Alfredo off himself—in disgust—because of the blood. (RR58: 106). Yahaira felt a bullet whiz past her in the closet, and her mother pulled her to the floor. (RR58: 105-106, 137). Applicant continued to shoot, killing Carlos, who had crouched down near the bathroom sink at the first gunshots. (RR58: 104, 107, 116). Yahaira recalled hearing about six gunshots. (RR58: 110). In the courtroom, Yahaira identified Applicant as the assailant who shot her father and uncle. (RR58: 82, 118).

Alfredo sustained two gunshot wounds, to the left side of his face and to his upper left chest. (RR59: 20, 267-269). Carlos also suffered two gunshot wounds, to the left side of his face and left shoulder. (RR59: 291). After shooting the men, Applicant left. (RR58: 107). Yahaira ran from the closet, telling her mother that her father had been killed. (RR58: 137). Maria saw that her husband and brother-in-law were covered in blood. (RR58: 138). As she came out of the closet, Maria heard additional gunfire outside the trailer. (RR58: 139).

The Dallas Police Department responded to the 911 robbery call immediately, while Applicant was still in the house. (RR58: 31, 44, 155). Officers were forming a perimeter around the trailer when Applicant fired the shots inside the home. (RR58: 158-160, 170, 172, 190, 205-206, 208-210). Officer Justin Bowen was positioned

outside at the rear wall of the trailer immediately adjacent to where shots were fired in the bathroom. (RR58: 208-210). Officer Bowen testified that he "heard five gunshots come from the immediate other side of that wall." (RR58: 208). A few moments later, Applicant exited the trailer onto the front porch; Officer Martin Rivera yelled "police" and instructed Applicant to get on the ground. (RR58: 172- 173, 190-191). Applicant fired his weapon at the officers and ran in the opposite direction toward the rear of the trailer, unexpectedly bumping shoulders with Officer Bowen in the dark. (RR58: 166, 173-174, 191-192, 195-197, 211-213; RR59: 31, 33-34). Officer Bowen saw Applicant's gun muffle flash and shot Applicant in the leg and back. (RR58: 213-214, 220-221; RR59: 107, 119-120). Officer David Yzaguirre jumped on Applicant to restrain him. (RR58: 160-161, 175, 215). Applicant struggled, refusing to be handcuffed. (RR58: 161-162, 175-177; RR59: 37-38). At least three officers were required to get Applicant under control. (RR58:161-162, 175-176, 180, 216, 233-234; RR59: 37). Officers recovered Applicant's .40 caliber Glock pistol from the ground near where the struggle occurred. (RR58: 176, 193-194; RR59: 84-85, 90-91; SE 81, 89). The slide was locked back, and all the ammunition in the gun had been fired. (RR58: 193, 236; RR59: 85). Alfredo's wallet and a two-dollar bill were also recovered from the ground. (RR59: 84-85, 92, SE 83, 92). The Court admitted Officer Bowen's in-car video and wireless body microphone recordings into evidence. (RR58: 221-228; SE 149).

Officers entered the trailer and performed CPR on Alfredo. (RR59: 18-22, 24, 39; SE 41). Carlos, who was lying face down on the bathroom floor, had no pulse. (RR59: 18, 41; SE 38). Eventually, the Dallas Fire Department declared both men dead at the scene. (RR59: 42).

Officers subsequently located Applicant's cohort, Anthony Burton, asleep in Applicant's vehicle in the driveway next door. (RR58: 45-46; RR59: 43-44, 48, 171- 178; SE 26, 44-46). Officers recovered a firearm, multiple sets of gloves, and one live round of ammunition from the car. (RR59: 134-141; SE 98-99, 101-102, 104,107, 110, 111A-111D).

DNA found on one of the gloves from the vehicle matched Applicant's DNA. (RR59: 214; SE 111C, 122). DNA test results on biological material from the magazine of Applicant's Glock pistol, State's Exhibit 89, included Applicant, Alfredo, and Carlos as possible contributors. (RR59: 209-211, 227, 229; SE 122). Testing on another swab from the pistol included Alfredo and Carlos as possible contributors. (RR58: 211-212; SE 122).

According to medical examiner Dr. Joni McClain, Alfredo sustained the gunshot to his cheek from a distance of one to three feet. (RR59: 267-268). This bullet traveled through the left side of his face, esophagus, and lung, and penetrated his chest wall. (RR59: 268; SE 132-133, 140). The gunshot to the upper left side of his chest perforated the left side of his trunk and entered the soft tissue surrounding the bladder. (RR59: 269; SE 140). Both gunshots traveled in a downward direction. (RR59: 274, 276-277, 285; SE 140). Dr. McClain removed both bullets during the autopsy. (RR59: 268-269, 278; SE 139-139A, 140).

Dr. Reade Quinton testified that the gunshot wound to Carlos's face entered and exited, causing stippling on Carlos's eyelid, nose, forehead, and cheek. (RR59: 291-292, 294-295; SE 142, 146). Dr. Quinton estimated the range of fire to be close to three feet. (RR59: 296-297). The gunshot to Carlos's left shoulder entered the left chest cavity, traveled through the lung, and grazed the aorta, moving in a downward direction. (RR59: 292, 295-297; SE 144, 146). Dr. Quinton removed the bullet that entered the shoulder. (RR59: 298; SE 145, 146). Carlos also had a laceration over his left eyebrow. (RR59: 293; SE 23, 142, 146). Anne Koettel, a trace evidence examiner, testified that analysis of Carlos's clothing along with range-of-fire testing of Applicant's gun indicated the gun muzzle was more than two feet away from Carlos's clothing when it was fired. (RR59: 247-252; SE 126-128).

Authorities transported Applicant to Baylor Hospital where he underwent surgery for his gunshot wounds and was hospitalized for one month. (RR59: 106, 114, 117; SE 117). The officer who rode with Applicant in the ambulance noticed he was

wearing one red glove, which was removed in the emergency room and retained with his clothing. (RR59: 148-153; SE 115, 117). Officers also recovered Carlos's wallet and the stolen jewelry from Applicant's possessions at the hospital. (RR59: 95-96, 151-154, 167, 177, 181-182; SE 20, 21, 115, 117). The initial toxicology screen done at the hospital indicated Applicant had opiates in his system, which medical personnel had administered for pain; the toxicology did not reveal that he had taken PCP. (RR59: 116-117).

Yahaira was the sole witness Applicant called during the guilt/innocence phase. (RR60: 79). She testified that her father was wearing a white t-shirt when Applicant shot him; the t-shirt apparently was not collected at the scene or retained. (RR60: 80). The State did not offer any rebuttal evidence (RR60: 81), and the jury found Applicant guilty of capital murder for the murder of Alfredo Gallardo in the course of or during a robbery, as charged in the indictment. (RR60: 126).

At the punishment phase of trial, the State presented evidence of multiple extraneous aggravated robberies Applicant committed during the month prior to the capital murder in the case-in-chief. In one of those robberies, Applicant shot three brothers, killing one.

Luis Gonzalez resided in an apartment at 810 Blaylock Street in Dallas. On February 15, 2009, two black males confronted him at his apartment door, forced him into the apartment, put a gun to his head, wrapped a sweatshirt around his head and face, and tied his wrists with speaker cord wires. (RR62: 230-236, 257). One man carried the gun and the other had an unlit cigarette in his mouth. (RR62: 233- 234). The men demanded money. (RR62: 235). They robbed him of his watch, shoes, a set of wheel rims (which were stored in his apartment), a stereo, his wallet containing approximately $450 in cash, another $900 from the apartment, and his cell phone. (RR62: 236-240, 256). Gonzalez believed the men were going to kill him. (RR62: 257). They ransacked the apartment. (RR62: 239). Each of the robbers wore one red glove and

one white glove. (RR62: 243). They fled the scene in a 1984 or 1985 white Ford with dark tinted windows. (RR62: 241-242). This description matched the description of Applicant's vehicle. (RR62: 242; SE 274-277). Gonzalez identified Applicant in the courtroom as the robber who pointed the gun to his head. (RR62: 255-256). After pointing to him, Gonzalez said, "It would be impossible for me to forget him." (RR62: 255).

Officers collected a glove and a cigarette butt from the crime scene. (RR62: 253; RR63: 12-16, 27; SE 176). DNA test results on a cutting from the glove included Applicant as a possible contributor. (RR63: 113-116; SE 279-280).

On March 3, 2009, Applicant and two accomplices committed aggravated robbery and capital murder in an apartment complex at 301 North Ewing in Dallas. Three brothers were shot; one died at the scene. (RR63: 147-148).

Margarito Chavez and Karen De La Cruz Espinoza lived in an apartment on the first floor with their five children. (RR63: 188). Espinoza and her son arrived home on March 3, 2009 at 10:30 p.m. and parked in the back parking lot of the complex. (RR63: 190-193). As Espinoza and her son walked through the lot, three black males followed; when she opened her apartment door, the men pushed them into the apartment. (RR63: 196-195). One man, who seemed to be the leader, pointed his gun at close range to the children. (RR63: 196, 200). A child translated what the men were saying into Spanish for his parents. (RR63: 197). The leader demanded that Espinoza turn over her handbag. (RR63: 196, 199). They threatened to kill the family. (RR63: 196-197). The men ransacked the apartment. (RR63: 202-204; SE 201, 203). They stole approximately $500 in cash, a payroll check for $380, an Xbox, DVDs, Espinoza's purse, a women's watch, Chavez's wallet, a set of keys, and a collapsible baton Chavez used in his work as a security guard; the men packed the items into the family's suitcases. (RR63: 204-205, 209). Two of the men left the apartment while one remained at the door. (RR63: 204). When the opportunity arose, Espinoza shoved him out the door. (RR63: 206-

207). Chavez viewed a photo lineup with Applicant's photograph in it but did not identify anyone. (RR64: 71-72). In the courtroom, Espinoza identified Applicant as the man who she described as the leader of the three men in her apartment. (RR63: 210-212).

Upstairs, Applicant attempted to enter Roberto Ramos's apartment. Ramos struggled with Applicant in an attempt to keep him from entering. (RR63: 232, 246). Ramos's brother Eustacio Torres Gallegos heard the commotion and went into the living room. (RR63: 234). Applicant shot Eustacio in the chest. (RR63: 234-236, 250). A third brother, Martin Figueroa Torres, walked into the living room and saw his brother struggling with Applicant. (RR63: 243-246). When Martin stepped toward the door, Applicant reached over Ramos's shoulder and shot him in the face. (RR63: 247-250).

Applicant then shot Ramos three times, in the mouth, upper back, and left thigh, killing him. (RR62: 232-235; RR63: 236, 250, 274; RR64: 104-105). A neighbor, Joe Ozuna, witnessed the shooting, which occurred on the landing outside the apartment door. (RR63: 272-278). Martin and Eustacio survived and testified at trial. The first officers at the scene found Ramos's body in the breezeway outside his apartment. (RR63: 153, 158; SE 211).

Ramos's 13-year-old daughter Jasmine Juarez was in a bedroom of the apartment. (RR63: 278). Upon hearing the gunshots, she called 911. (RR36: 288). The Court admitted the recording of her 911 call into evidence. (RR63: 289). A few minutes later, she found her father on the ground outside the apartment door; she kissed him and told him she loved him. (RR63: 293-294).

Martin later identified Applicant in a photo lineup after viewing the lineup for about two-and-a-half minutes. (RR63: 254-255; RR64: 67-75). Applicant challenged the validity of this identification during cross-examination of Martin and a detective who viewed the lineup procedure. (RR63: 256, 261-268; RR64: 72-75). Martin did not identify Applicant in the courtroom. (RR63: 253).

After the upstairs shootings, the two suspects fled toward the rear of the apartment complex, dropping a watch, set of keys, and Chavez's baton. (RR63: 166- 168, 178, 208-209, 313; RR64: 37; SE 232, 234, 243). DNA obtained from biological material on the baton matched Applicant's DNA. (RR64: 93-96; SE 254-255). The DNA analyst testified that one would expect to find that same DNA profile only once in every 8.34 trillion people. (RR64: 96). On March 11, 2009, a surveillance video at Cash Plus Pawn recorded a transaction in which Applicant pawned the Xbox stolen in the robbery; the pawn ticket reflected Applicant's name. (RR63: 296-302; RR64: 44-49; SE 248, 249, 251).

The State offered evidence related to Applicant's youth, including that he was assigned to a behavioral adjustment classroom for disruptive students at Brandenburg Middle School in Garland, Texas. (RR62: 30). A Garland police department school resource officer testified that, when Applicant was 14-years-old, his mother reported him as a run-away, and his Dallas middle school suspended him. During this incident, Applicant became combative. Applicant's mother refused to pick him up, and the school resource officer took him into custody, transferring him to a Dallas facility for run-away children. (RR62: 33-36).

A former assistant principal at Samuel High School in Dallas, where Applicant was a freshman, testified that school personnel found a knife with a six- inch blade hidden in the lining of Applicant's coat in February 2000, and authorities arrested him. (RR62: 74-79, 84-86; SE 166). The following school year, in September 2000, Applicant was arrested at school for possession of marijuana. (RR62: 87-90).

The Court admitted photographs of Applicant's tattoos, a number of which are associated with gangs. (RR62: 150-163). Detective Barrett Nelson, a Dallas police officer assigned to a U.S. Marshall's Task Force at the time of trial and previously assigned to the Dallas Gang Unit, testified as an expert witness. (RR62: 43). At the prosecutor's request, Nelson examined the photographs of Applicant's tattoos. (RR62: 46). He explained that the "STR8"

tattoo on Applicant's right forearm and "HOOD" on his left forearm are meant to be lined up and read "straight hood," which means Applicant comes from the hood, or street, and will handle his business in a hood type of manner. (RR62: 46-47; SE 152-155). He indicated the tattoo "HUSTLA," meaning hustler, on the inside of Applicant's right forearm indicates he is hustling for his money, in life, and to get ahead, including selling narcotics. (RR62: 48-49; SE 156). The witness added that most gang members are selling narcotics or "jacking and robbing people"—i.e. hustling for their money. (RR62: 49).

Detective Nelson explained that Applicant's tattoo, "Fish Trap," references the Fish Trap Bloods criminal street gang in Dallas. (RR62: 50-51; SE 159). This street gang is named after the former Fish Trap projects on Fish Trap Street in West Dallas. (RR62: 50-51). Applicant also has tattoos of "West" and "212." (RR62: 50-52; SE 158). The number 212 is associated with West Dallas, which has the zip code 75212, and is associated with the Fish Trap Bloods. (RR62: 51). The number 3500 on the inside of Applicant's left forearm represents the 3500 block in front of the former Fish Trap projects. (RR62: 52; SE 162). Applicant's star tattoos also mean he is associated with the Bloods. (RR62: 51).

Nelson testified that, in his opinion, the combination of the "Fish Trap," stars, and the numbers 212 and 3500 indicate Applicant is a Fish Trap Bloods gang member. (RR62: 51-53, 64; SE 159-160). Applicant's left forearm also has a tattoo of "Piru," which is the street in Los Angeles where the Bloods were founded. (RR62: 53; SE 163). Applicant has a tattoo, "CK," which Nelson testified means "Crip killer," again indicating Applicant is a Blood member; in West Dallas, the rival gang to the Fish Trap Bloods are the Rupert Circle Crips. (RR62: 53). The officer further testified that the red items Applicant carried at the time of the capital murder—a red cell phone and red key chain—and the red glove he was wearing demonstrate his allegiance to the Bloods and identify him as a gang member. (RR62: 63-64). In closing on direct examination, Nelson testified the Bloods are known as a particularly violent gang; during the witness's time in the Dallas

gang unit, they committed murders, aggravated robberies, narcotics sales, assaults, and home invasion robberies. (RR62: 64). On cross-examination, Nelson explained that Fish Trap Bloods are not an organized gang with an organizational hierarchy or meeting place. (RR62: 65-68). He also testified that Applicant is not listed as a gang member with the Dallas police department's gang unit. (RR62: 68-69).

Christopher Arno testified that he and Applicant were acquaintances in Atlanta, Georgia in 2002. (RR62: 94-99). The two men lived in the same apartment complex. On one occasion, Applicant pulled what appeared to be a handgun (but was a BB gun) on Arno; on another occasion, Arno found Applicant passed out on his front porch early one morning. (RR62: 101-103, 107, 113). Arno called the police, and Applicant was arrested for criminal trespass, a misdemeanor. (RR62: 104-106, 113-115). Because of these interactions, Arno was frightened of Applicant and moved out of the apartments. (RR62: 101, 106).

Several police officers testified that they arrested appellant in Dallas for various offenses: on December 5, 2002, for unauthorized use of a motor vehicle; on December 23, 2003, on warrants for probation violation and burglary; on September 20, 2006, for traffic violations in which he was later charged with felon in possession of a firearm; on April 19, 2007, for unauthorized use of a motor vehicle; and on December 27, 2007, for possession of marijuana. (RR62: 119-131, 166-171, 175-182, 188-194, 197-200; RR63: 125-136; SE 171-172). The jury heard testimony from Applicant's probation officer regarding several probation violations of failure to report and drug use. (RR62: 142-164). The Court admitted into evidence certified judgments reflecting Applicant's prior criminal convictions. (RR62: 208-209; SE 167, 168, 170, 170A, 173, 175).

In his punishment case, Applicant re-called Martin Figueroa Torres to testify about his police interview and photo lineup identification. (RR64: 142-148). Applicant also called an expert, Dr. Charles Weaver III, who testified extensively about eyewitness

identification. (RR64: 155-191, 211-214). Weaver indicated he had never seen a witness view a lineup for two-and-a-half minutes before making an identification. (RR64: 186-187).

Four of Applicant's family members testified in detail about his upbringing, youth, family history, education, and character: his mother, Pamela Maddox; stepfather, Ramon Maddox ("Ramon Sr."); half-brother, Ramon Madddox, Jr. ("Ramon Jr."); and a cousin, Shamy Conley. Applicant's mother was a seventeen- year-old high school dropout when Applicant was born. (RR64: 219). When Applicant was a small child, she went out a lot, left him with other people, smoked marijuana, and drank alcohol. (RR64: 222, 227-228). Applicant's biological father, Eric Propes, was incarcerated much of Applicant's life, had little involvement with him, and used crack cocaine.[2] (RR64: 218-219, 239, 258). When Applicant was two-years-old, he was in a car accident with his mother, hit his head, and was knocked unconscious; the repercussions of this accident were unknown. (RR64: 230-232).

Pamela married Ramon Sr. when Applicant was three years old. (RR64: 227, 244-45; RR65: 37). Pamela and Ramon Sr. had a volatile relationship; Ramon Sr. was physically abusive. (RR64: 225-226, 263; RR65: 41-42). The children witnessed some of this violence for about ten years.[3] (RR64: 227, 261, 263-264). Ramon Sr. was very strict; he disciplined Applicant with a belt and extension cord and struck him. (RR64: 237, 259-260; RR65: 41-42). On one occasion, Ramon Sr. choked Applicant; another time, his mother hit him with a broom (for stealing her car at age 12). (RR64: 260-261). The parents partied, left the children with Applicant in charge at 11 or 12 or 13 years of age, and used alcohol and marijuana in front of the children.[4] (RR64: 262-263, 280; RR65: 42).

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[2] Eric Propes was incarcerated at the time of Applicant's trial. (RR64: 218

[3] Ramon Jr. testified he never actually saw his parents hit one another, but he saw them arguing while holding a knife and an iron, and he frequently heard them fighting. (RR64: 263-264, 285).

[4] Ramon Jr. testified, however, that he never saw his parents using illegal drugs. (RR64: 281).

Family members testified Applicant was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) at age six or seven; he had difficulty in school and was placed in special education in second or third grade. (RR64: 228-229, 286-287; RR65: 42-43). Learning was hard for Applicant. (RR65: 42-43). He continued in special education until he dropped out of school in the tenth or eleventh grade. (RR64: 209, 228, 239). He had a difficult time in school, and other students teased about his special education placement. (RR64: 266). Doctors prescribed Ritalin from age seven through 14. (RR64: 229-230, 264-65). The Ritalin made him lethargic. (RR65: 43). When Applicant was young, he set a back room in the family's house on fire. (RR65: 45).

Evidence indicated Applicant's mother gave him insufficient attention and affection during his upbringing. (RR64: 234). She was emotionally distant. (RR64: 235). She suffers from manic depression, schizophrenia, and bipolar disorder and has a history of multiple mental health hospitalizations, including one for a suicide attempt. (RR64: 237-238; RR65: 47). Ramon Sr.'s testimony indicated Pamela sometimes had auditory and visual hallucinations. (RR65: 46). There is mental illness in Applicant's maternal and paternal families. (RR64: 237-238). Ramon Sr. testified that beginning at age 10, Applicant would become depressed and talk about killing himself. (RR65: 50).

Ramon Jr. was aware that Applicant joined a gang when he was 10 years old. (RR64: 268, 276-277). When Applicant was 11 or 12, he helped take care of his two younger brothers, cleaned house, and cooked. (RR64: 262). He attempted to protect his siblings from his parents' physical violence and fighting. (RR64: 264). Ramon Jr. and Conley (a cousin) testified that they loved Applicant. (RR64: 272; RR65: 100). Conley said he was fun loving as a youth and very protective of her and her sister. (RR65: 91). Applicant began running away from home at age 13, and, due to the physical abuse in his household, began challenging his stepfather at age 15. (RR64: 233-234, 251). He ran away often but returned to check on his brothers. (RR64: 274-275).

Applicant's mother and stepfather's lifestyle changed when he was fifteen years old. (RR64: 226, 235). Ramon Sr. testified that he became a Jehovah's Witness and gave up marijuana and alcohol. (RR64: 54-55). He tried to involve Applicant and his brothers in activities with the church. (RR64: 236, 254).

Family members reported Applicant used alcohol, marijuana, and PCP. (RR64: 269, 273-274; RR65: 59, 94). Ramon Jr. testified Applicant talked to himself and became paranoid when he used drugs. (RR64: 269-270). Applicant's cousin testified he was paranoid and heard voices when he used PCP. (RR65: 94). Ramon Jr. said that Applicant talked to himself and acted strange even when he was not using narcotics; he did not know, however, if Applicant had mental health issues. (RR64: 270-271, 274). Ramon Sr. testified that, when Applicant was older, he called home and talked about people watching him and talking to him. (RR65: 51). At these times, Applicant's mother would sometimes locate Applicant and bring him home. (RR65: 51).

Applicant has three children. (RR64: 239, 272). Ramon Sr. testified Applicant has been more attentive and responsible since being incarcerated for this offense. (RR65: 58). Applicant has expressed remorse for these offenses. (RR65: 59). During his incarceration in Dallas County, Applicant has been taking medications that have helped him. (RR65: 60).

Applicant called additional expert witnesses to testify about the following subject matters: alcohol and drug addiction, including PCP use; Applicant's childhood risk factors for violence, as evidenced during his family members' testimony at trial; the management of inmate populations and the prison system's ability to successfully manage inmate behavior; and the Texas prison system. (RR64: 156-216; RR65: 119-146, 152-233).

Dr. John Roache has a Ph.D. in pharmacology and specializes in clinical pharmacology. (RR65: 119-122, 140). He is a professor of psychiatry and pharmacology and chief of the division of alcohol and drug addiction at the University of Texas

Health Science Center medical school in San Antonio. (RR65: 119-121; DE 23). For over 30 years, he has conducted research with patients to understand the causes and consequences of drug abuse and addiction. (RR65: 121).

Dr. Roache reviewed Dallas County jail records reflecting that in December 2008, Applicant was in the Dallas County jail on a marijuana charge, and a jail physician diagnosed him with Cannabis Dependence, along with an indication to rule out Drug-induced Psychosis and Mood Disorder. (RR65: 137-138, 142-143). Other jail records reflected Applicant had a PCP dependence that included a history of daily PCP use. (RR65: 138-139, 144-145).

Dr. Roache testified at trial that early life risk factors can lead a person to begin using drugs, and repeated use and exposure causes the drugs to act biologically on the brain. (RR65: 124-126). Over time, drugs take control of the reward center of the brain (which is a motivational brain circuit) and other rewards and pleasures in life diminish in importance—life all becomes about drug involvement, seeking and procuring a supply, consuming and using drugs, and recovering from drug effects. (RR65: 124-125). This chronic drug condition affects the frontal lobes of the brain, which involve conscious decision making and planning; ultimately, the drug user has less volitional control and exhibits more impulsive action. (RR65: 125-126). ADHD in early childhood involves the frontal lobes, and the inability to control oneself, by acting impulsively without thought and planning. (RR65: 126). Individuals already driven by impulse and urge, who lack thought and planning, are vulnerable to addiction, leading to a vicious cycle. (RR65: 126-127).

Dr. Roache also testified at trial about the effects of chronic marijuana and PCP use. (RR65: 127-135). PCP, or phencyclidine, affects the neurochemical systems in the brain that are involved in motivational circuitry. (RR65: 128). PCP has both sedative and stimulant properties, which is very unsettling for most people. (RR65: 129-130). It simultaneously causes a dissociative state where nothing matters (dulling sensations and relaxing a person),

while at the same time also agitating and arousing him. (RR65: 130). PCP additionally has a euphoria affect and creates a sense of empowerment, invincibility, and invulnerability. (RR65: 130). PCP can create visual hallucinations and psychotic effects, including paranoia and persecutory delusions. (RR65: 130-133). PCP can in addition rarely cause extreme violence. (RR65: 133-134). Some people are particularly vulnerable to PCP-induced psychosis involving paranoia and violence, and experts do not know why, although bipolar mania and schizophrenia produce risks for PCP-induced mania or psychosis. (RR65: 133-134, 144). Engaging in extreme violence under the influence of PCP, though rare, tends to be associated with individuals who have underlying vulnerabilities, like bipolar and schizophrenia, in their personal or family history. (RR65: 135, 143-144). Dr. Roache testified that once a person is in a setting without PCP, the person would become more clear, more coherent, and more in control. (RR65: 140).

Dr. Gilda Kessner, a psychologist, testified based on listening to Applicant's family members' testimony in the courtroom (his stepfather, mother, brother, and cousin) and applying the relevant research and literature to his circumstances. (RR65: 20, 22, 154-156, 163-164). Dr. Kessner did not interview Applicant. (RR65: 20, 154). The defense team used Dr. Kessner's testimony to educate the jury about the risk factors present in Applicant's life from an early age, which research shows correlate with the probability that a child will be violent in the future. (RR65: 20).

Dr. Kessner testified there is research identifying certain commonalities or risk factors in a child's life that correlate with the potential for violence in the future. (RR65: 155-156). She explained that the Department of Justice, Office of Juvenile Justice and Delinquency Prevention, and Office of the Surgeon General have compiled studies and statistics into meta-analysis identifying these risk factors for juveniles. (RR65: 155). The primary goal of this research is to identify the best opportunity to intervene to prevent future delinquency or violence. (RR65: 156, 161).

Dr. Kessner testified that an early risk factor with regard to Applicant that stands out in particular is hyperactivity—which is a primary risk factor for delinquency, disruptive behavior, and violence later in life. (RR65: 155-157). Applicant's parents reported he was identified with hyperactivity in his early school years. (RR65: 156-157). Other risk factors that apply to Applicant involve being born to a young mother who lacked parenting skills:

> Being born to a young mother without any parenting skills is another factor. That his mother - - she was pretty clear on describing that she didn't have that ability, that sensibility, when she was 16 or 17 when he was born and, consequently, she still wanted to be a teenager herself so she allowed him to be babysat or watched by a variety of different people. She didn't name them or identify who they were in particular other than her mother, but that she wasn't equipped to parent a newborn or a toddler. . . . And you know, a young child learning - - having the first level of security with the parent and not getting that, is going to have some behavior problems.

(RR65: 157-158). Dr. Kessner testified that the fact Applicant's mother had a difficult time showing affection to him would affect his secure attachment to his primary caretaker, which influenced his emotional development. (RR65: 158). With regard to the State's earlier emphasis on the fact Applicant's brother grew up in the same household but was never violent, Dr. Kessner explained that children are never raised the same or in the same world, and each child is born essentially into a different family, because the family circumstances are different for each child: Applicant was born to a single mother and biological father who was incarcerated when Applicant was young, while his brother was born to a married couple with an older half-sibling (Applicant). (RR65: 158-159, 166-168). Thus, the exposure and the genetics of the siblings was different. (RR65: 159).

Dr. Kessner testified that the risk factors have a multiplicative or cumulative effect. (RR65: 160). For example, a child at age 10 who has six of the risk factors is 10 times more likely to commit an offense or be violent by age 18 or older than a child at age 10 who has only one risk factor. (RR65: 160). Dr. Kessner said it is noteworthy that Applicant met his biological father (who had a history of incarceration) at ages three and 11 and Applicant's mother began having significant mental health problems when he was around age 10 or 11. (RR65: 160-161). Either of these factors alone would be very emotionally disruptive to a child; such circumstances would create chaos in the family and be confusing to a 10 or 11 year old. (RR65: 160-161).

Dr. Kessner explained that the purpose behind the research is to identify not just risk factors but also the protective factors, which may be more difficult to define or identify—for example, poor grades are a risk factor, and good grades are a protective factor. (RR65: 161). She testified that being born into poverty is another risk factor, and having supportive parents is a protective factor, but those are not on a continuum. The research is ongoing on those issues, and regarding the concept of the resilience of the individual. (RR65: 161-162).

In rebuttal, the State offered witness Bobby Moorehead, a Dallas County Sheriff's Deputy, to testify about drawings Applicant made during voir dire. (RR65: 234-235, 238-239; SE 165). Defense counsel cross-examined Deputy Moorehead about an incident during voir dire in which two deputies were escorting Applicant from the jail to voir dire proceedings; the deputies inadvertently left Applicant unsupervised in a courthouse elevator. (RR65: 240-245). Applicant did not leave the elevator. (RR65: 245). The elevator went up and down once, and deputies intercepted it. Applicant was not handcuffed or shackled but was wearing a stun belt at the time. (RR65: 241, 247).

The State called the detective who showed the photographic lineup to Martin Figueroa Torres to testify about the identification. (RR65: 248-258). She said that in his identification, Martin said,

"mas o menos," which could be translated from Spanish into English as "more or less," but also means "yes, that is it; that's the person." (RR65: 255-256).

Two Dallas County detention officers testified about Applicant's incarceration in the Dallas County jail since his arrest. One officer testified the jail has received inmate reports that Applicant runs his tank by bullying other inmates and trying to use their commissary funds; jail authorities have moved Applicant from tank to tank as a result. (RR65: 270-277, 282-283). The officer indicated Applicant is very clever and uses his size to intimidate other inmates. (RR65: 275-276).

Five members of the Gallardo family told the jury how their father's murder has affected the family. (RR65: 285-294). Finally, the State offered and the Court admitted several recorded jail calls, including Applicant's conversations with his child's mother, a friend, and his mother. (RR65: 295-303; SE 295-298). In one conversation, the mother of Applicant's child accused him of not "caring" or he would not have put himself in his current situation. (RR65: 301). Applicant responded that he had "motherfucking bills to pay." (RR65: 301). In separate conversations with a friend and his mother, Applicant provided different accounts of an altercation he had with another inmate over a pair of shoes; the inmate required medical treatment at the hospital for a gash on his head. (RR65: 301-303; RR66: 12- 18). Finally, in a recorded telephone call with a friend after the guilty verdict issued, Applicant stated that when he gets to prison he will "put bread in his pocket" and continue "the hustle." (RR65: 18-21; SE 295A, 295B).

Based on the foregoing and other evidence before them, the jury answered the special issues in a manner that required the Court to sentence Applicant to death.

PROCEDURAL HISTORY

Applicant is confined pursuant to the judgment and sentence of the Criminal District Court No. 7 of Dallas County, Texas,

convicting him of the March 17, 2009 capital murder of Alfredo Gallardo committed in the course of a home-invasion robbery. (CR2: 709-711). In accordance with the jury's answers to the special issues, this Court sentenced Applicant to death on May 21, 2012. (CR2: 684-685, 709-711).

Applicant appealed his conviction and sentence. The Texas Court of Criminal Appeals affirmed this Court's judgment on direct appeal. *Harris v. State*, No. AP- 76,810, 2014 WL 2155395 (Tex. Crim. App. May 21, 2014) (not designated for publication). On August 14, 2014, Applicant filed a petition for writ of certiorari on his direct appeal in the United States Supreme Court. On January 12, 2015, the Supreme Court denied his petition. *Harris v. Texas*, 135 S. Ct. 945 (2015).

On June 11, 2014, Applicant filed his original application for writ of habeas corpus under Article 11.071 of the Texas Code of Criminal Procedure, alleging six grounds for relief. The State received a statutorily authorized extension of time and filed its answer on December 10, 2014. On February 6, 2015, this Court entered an Order Designating Issues, which designated Applicant's Claims 1 through 5 for further investigation. The Court conducted an evidentiary hearing on those issues on May 29, 2018 to June 1, 2018; July 16, 2018; and September 10-12, 2018. The Court ordered the parties to file proposed findings of fact and conclusions of law by October 23, 2019.

GENERAL FINDINGS OF FACT

(1) The Court takes judicial notice of the Court's trial file in cause number F09- 00409-Y.

(2) The Court takes judicial notice of the clerk's record from the trial in cause number F09-00409-Y.

(3) The Court takes judicial notice of the entire reporter's record from the trial in cause number F09-00409-Y.

(4) The Court takes judicial notice of the Court's writ file in cause number W09- 00409-Y(A), with the exception of two of Applicant's filings that the Court has stricken from the record by its prior Order dated July 19, 2019. Those two filings are:

(a) "Bone Lead Test Result and Interpretation" Report for Pamela Maddox by Ferne Nilsa Cummings, M.D., Icahn School of Medicine at Mount Sinai, dated October 24, 2018, attached as Applicant's Exhibit A to Applicant's "Supplemental Bone Lead Evidence – Bone Lead Testing Result for Pamela Maddox," filed December 4, 2018; and

(b) Expert Rebuttal Affidavit of Dr. Julian Davies, dated April 4, 2019, attached as Exhibit C to "Roderick Harris's Submission of Additional Evidence Pursuant to the Court's November 26, 2018 Order," filed June 12, 2019.

The Court finds Applicant filed these two items without permission and in violation of the Court's November 26, 2018 Order, which delineated the only remaining evidence to be allowed in this case. The Court has not considered the contents of those two filings in making these findings of fact and conclusions of law.

(5) The Court takes judicial notice of the entire reporter's record from the writ proceedings in cause number W09-00409-Y(A).

(6) At the writ hearing, this Court admitted Exhibit 1 to Applicant's writ application, the Affidavit of Dr. Natalie Novick Brown, only to the extent other experts relied on the affidavit in this writ proceeding. (WRR2: 117-118; WRR7: 6-7). The Court has not considered Dr. Brown's Affidavit and the information contained in it for any other purpose.

(7) At the writ hearing, this Court admitted Exhibit 4 to Applicant's writ application, the Affidavit of Charles Rotramel, only to the extent other experts relied on the affidavit in this writ proceeding. (WRR2: 116-118; WRR7: 9). The Court has not considered Mr. Rotramel's Affidavit and the information contained in it for any other purpose.

(8) At the writ hearing, this Court admitted Exhibits 8, 9, 10, 12, 13, 15, 16, and 17 to Applicant's writ application only to the extent an expert relied on these affidavits in this writ proceeding. (WRR7: 5-6). The Court has not considered these affidavits for any other purpose. The Court does not admit these affidavits and the information contained in them for the truth of the matters asserted.

Exhibits 8, 9, 10, 12, 13, 15, 16, and 17 are:

Exhibit 8: the Affidavit of Shirley Cook
Exhibit 9: the Affidavit of Lisa
Escobedo Exhibit 10: the Affidavit of
Michael Harris
Exhibit 12: the Affidavit of Ramon
Maddox, Sr. Exhibit 13: the Affidavit of
Ramon Maddox, Jr. Exhibit 15: the
Affidavit of Eric Propes
Exhibit 16: the Affidavit of Kenneth
Propes Exhibit 17: the Affidavit of Willie
Propes

SPECIFIC FINDINGS OF

FACT GROUND 1
Alleged Ineffective Assistance of Trial Counsel

In Ground 1, Applicant contends trial counsel rendered ineffective assistance by not sufficiently investigating and presenting evidence during the punishment phase of trial that he suffers from a fetal alcohol spectrum disorder and was exposed to

toxic levels of lead as a child. (Application, at 19-41). Applicant further contends in Ground 1 that trial counsel rendered ineffective assistance by not presenting the testimony of a social historian or a school-to-prison-pipeline expert during the punishment phase of trial to explain the mitigating impact of his life history. (Application, at 41-70). In particular, Applicant asserts that trial counsel should have presented the testimony of Laura Sovine, or a similar social worker, to explain Applicant's social history and Dr. Courtney Robinson, or a similar school-to-prison- pipeline expert, to explain Applicant's school-to-prison life trajectory to the jury. (Application, at 43-45). He further asserts that trial counsel should have presented a gang expert to turn the aggravating aspect of Applicant's gang membership into mitigating evidence. (Application, at 42-44, 57-58, 68-69).

The benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986).

An applicant asserting a claim of ineffective assistance of counsel has the burden to prove, by a preponderance of the evidence, that (1) counsel's performance was deficient, falling below an "objective standard of reasonableness," and (2) the deficient performance prejudiced the defense such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012).

Strickland's first prong "sets a high bar." *Buck v. Davis*, — U.S. —, 137 S. Ct. 759, 775 (2017). An accused is not entitled to representation that is errorless. *Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993). Reviewing courts indulge a strong presumption that counsel's conduct fell within the wide range of reasonable assistance, and that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689; *see Ex*

parte McFarland, 163 S.W.3d 743, 753 (Tex. Crim. App. 2005). The mere fact that another attorney might have pursued a different tactic at trial does not suffice to prove a claim of ineffective assistance of counsel. *Ex parte Miller*, 330 S.W.3d 610, 616 (Tex. Crim. App. 2009). The *Strickland* test is judged by the totality of the representation, not by counsel's isolated acts or omissions, and the test is applied from the viewpoint of an attorney at the time he acted, not through hindsight. *Jimenez*, 364 S.W.3d at 883; *McFarland*, 163 S.W.3d at 753.

A record that does not explain trial counsel's decisions will not show deficient performance "unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *See Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013) (quoting *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012)).

Although a reviewing court may refer to standards published by the American Bar Association and other similar sources as guides to determine prevailing professional norms, publications of that sort are only guides because no set of detailed rules can completely dictate how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688-689.

Ineffectiveness claims may not be built on retrospective speculation; the record must affirmatively demonstrate the alleged ineffectiveness. *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). Moreover, if a reviewing court can speculate about the existence of further mitigating evidence, then it just as logically might speculate about the existence of further aggravating evidence. *Id.* at 835-836.

The United States Supreme Court has explained that "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v.*

Smith, 539 U.S. 510, 521-522 (2003) (quoting *Strickland,* 466 U.S. at 690-691). Thus, counsel has a duty to make reasonable investigations or to make reasonable decisions regarding further investigations. *See Wright v. State,* 223 S.W.3d 36, 42 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). In an ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id.*

Determining whether prejudice exists in the context of a failure-to-investigate claim relating to the punishment phase requires courts to evaluate the totality of the evidence in determining whether, if the jury had been confronted with the uninvestigated evidence, there is a reasonable probability it would have returned a different sentence. *Ex parte Briggs,* 187 S.W.3d 458, 470 n.37 (Tex. Crim. App. 2005) (citing *Wiggins,* 539 U.S. at 536). An applicant must affirmatively prove prejudice; it is not enough to show that the errors of counsel had some conceivable effect on the outcome of the proceedings. *Strickland,* 466 U.S. at 693.

To render performance that is constitutionally sufficient, counsel should pursue all reasonable leads. *Wiggins,* 539 U.S. at 524. In evaluating counsel, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *Id.* at 527. However, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard,* 545 U.S. 374, 383 (2005).

Additionally, trial counsel is entitled to rely on their experts. *See Murphy v. Davis,* 901 F.3d 578, 592-593 (5th Cir. 2018) (finding that counsel was entitled to rely upon the objectively reasonable evaluations and opinions of their expert) (citing *Segundo v. Davis,* 831 F.3d 345, 352 (5th Cir. 2016)); *Wilson v. Sirmons,* 536 F.3d 1064, 1089 (10th Cir. 2008) (noting that, to a degree, counsel

should be able to rely on an expert to determine what evidence is necessary to an effective evaluation, and what additional evidence the expert needs to complete testing).

The Defense Team

(9) The Court appointed Brad Lollar, Doug Parks, and Mike Howard to represent applicant in this capital murder trial. (WRR4: 68; WRR7: 146; WRR8: 16). Mr. Lollar was first-chair counsel; Mr. Parks was second-chair counsel; and, Mr. Howard was third-chair counsel. (WRR4: 71-73; WRR7: 146, 167; WRR8: 16). In June 2011, the Court appointed Mr. Parks to replace the original second-chair, Russell Wilson, who left defense practice to join the District Attorney's Office. (WRR4: 72-73, 123; WRR8: 16, 68). Applicant's family had also retained Calvin Johnson before the State filed its Notice of Intent to Seek Death. Mr. Johnson continued on the case as additional counsel to the appointed attorneys. His role primarily consisting of communicating with Applicant and Applicant's family. (WRR4: 71-73).

(10) Mr. Lollar and Mr. Parks have very extensive criminal trial experience in death penalty cases.

(11) Mr. Lollar has tried 14 death penalty cases, beginning in 1987; defendants in at least three of those cases received a life sentence. (WRR4: 68-69; WRR9: 18). In the most recent case that Mr. Lollar tried (prior to his testimony in the writ hearing), Erbie Lee Bowser received a life sentence. (WRR4: 69).

(12) Mr. Lollar was licensed to practice law in 1977. He was a Dallas County Assistant District Attorney from August 1977 until January 1982. He was a criminal defense attorney in private practice from 1982 to 2005 and 2008 to 2013. He was the appointed Chief Public Defender in Dallas County from 2005 to 2008. Since March 4, 2013, he has been employed in the Capital Murder Division of the Dallas County Public

Defender's Office. (WRR4: 66-67, 69; WRR State's Exh. 5).

(13) Mr. Lollar presents at continuing legal education seminars for the Dallas Bar Association, the Dallas Criminal Defense Lawyers Association, and the Center for American and International Law. (WRR4: 70-71; WRR State's Exh. 6).

(14) Mr. Parks was licensed to practice law in 1970 and has been in private practice criminal defense since about 1971. (WRR8: 13). He has extensive experience representing capital defendants: at the writ hearing, he testified he was working on his 26th death penalty case. (WRR3: 98-99, 120; WRR8: 13). He tried his first death penalty case in 1978. (WRR8: 14).

(15) Mr. Lollar and Mr. Parks have tried three or four death penalty cases together previously. (WRR8: 43-44) Defendants in at least two of those cases received life sentences. (WRR8: 15).

(16) Mr. Howard was licensed to practice law in Texas in 2004. (WRR7: 144). This was his first death penalty case, although prior to this trial he worked for approximately five years in the Dallas Public Defender's Office—including two years in felony courts trying jury cases, including murders and capital murders—and worked in private defense practice. (WRR7: 145- 146). Mr. Howard has experience trying two capital murder trials with Mr. Lollar when Mr. Lollar was Dallas County's Chief Public Defender. (WRR4: 124; WRR7: 147).

(17) The Court appointed Mr. Howard to the trial team after Mr. Parks, and he began working on the case in September 2011. (WRR7: 146, 170).

(18) Mr. Lollar retained Brendan Ross as the trial team's mitigation specialist. (WRR4: 74). Ms. Ross has a Master's Degree in Social Work and has been a mitigation specialist since 2003. (WRR9: 17). She has worked on more than 50 death penalty cases. (WRR9: 17). She attends annual trainings by the Texas Criminal Defense Lawyers

Association, National Association of Criminal Defense Lawyers, and National Association of Social Workers. (WRR9: 17). She has worked on several cases with Mr. Lollar. (WRR9: 18). Mr. Lollar testified he had regular contact with Ms. Ross throughout their representation. (WRR6: 159). Ms. Ross began working on the case in December 2010. (WRR9: 49-50).

(19) The defense team's themes in the punishment phase included a theme that Applicant is not a future danger when he is in custody and has no access to drugs or PCP—which had made him paranoid and prone to outbursts. (WRR4: 90-91, 96-97; WRR7: 150; WRR8: 39, 41-42). While incarcerated, Applicant exhibited a marked downslide in any misconduct or violence. (WRR4: 90, 96-97; WRR7: 150). The team used expert testimony, by S.O. Woods and James Aiken, to explain the Texas Department of Criminal Justice's (TDCJ's) inmate classification system, TDCJ's ability to professionally manage and control inmate behavior, and prison security and administration—in order to show that the probability of future dangerousness is low. (WRR7: 150-151; RR65: 192-233, 170-192). Additionally to show Applicant was not a future danger, the team used an incident in which deputies were escorting Applicant to a conference room for jury selection and left him alone, unsupervised, in a courthouse elevator (while the elevator traveled up and down), and he was a perfect gentleman; he made no attempts to hurt anyone, escape, or take any inappropriate actions. (WRR4: 106-114; WRR7: 151).

(20) Mr. Parks noted in his testimony at the writ hearing that the definition of mitigating evidence in Texas is: some evidence that would tend to lessen a person's moral blameworthiness. (WRR8: 42). Mr. Parks explained some jurors might consider Applicant's drug dependence to be mitigating, in addition to being relevant to the future danger special issue, and this evidence could improve Applicant's chances for a favorable answer to the mitigation special issue. (WRR8: 42).

(21) The trial team's intent in the mitigation case was also to counter the State's theme of personal responsibility and choices and show that Applicant was a child like any other, but a series of choices were made for him that he had no hand in—including that his mother exposed him to marijuana in utero, that she left him to go out and party, that his biological father abandoned him, that his step-father abandoned him by partying until Applicant was a teenager, and that he witnessed domestic violence in the home. (WRR7: 152-153). The team intended to show these circumstances then set Applicant down a path with a predisposition to mental health issues (with onset of mental health issues in his late teens), and drug abuse—all of which resulted in acting out and adult criminal behavior. (WRR7: 153). Defense themes in the mitigation case were also (a) the familial and Applicant's history of mental health issues, (b) Applicant's history of drug abuse, especially PCP, and its interplay with psychosis and schizophrenic symptoms, and (c) the possible neurological damage Applicant received at two years old from a head injury during a car accident. (WRR7: 151-152).

(22) Of the three attorneys, Mr. Howard was the primary contact with Applicant, and worked at establishing a personal connection with him. (WRR7: 148). Mr. Howard focused too on Applicant's initial criminal offenses as an adult, and thematically tying those back into the larger mitigation case, including the mental health, neurological health, and drug use themes. (WRR7: 148- 149).

(23) Mr. Howard testified that he did the first half of Applicant's closing arguments in the punishment phase, where he focused on the mitigation special issue. (WRR7: 149). To do that, he reviewed Applicant's personal history, including pre-birth, youth, experience in the home, mental health history, drug use history, and special education issues, and tied those aspects of Applicant's life into the expert testimony of Dr. Gilda Kessner and others. (WRR7: 149). Mr. Howard testified

that Mr. Lollar's focus in the second half of closing arguments in the punishment phase was the death penalty as a whole, conveying the moral objections to the death penalty to the jury, and the future dangerousness special issue. (WRR7: 149).

(24) The defense team was cognizant of putting the best narrative before the jury while not opening the door for a counter attack. (WRR4: 76; WRR7: 160- 161; WRR9: 20-21).

(25) Mr. Parks testified that in his opinion and experience, although writs of habeas corpus in death penalty cases tend to focus on the mitigation special issue, there is a better chance at trial of obtaining a death sentence on the future danger special issue. (WRR8: 41-42). He testified the defense team here tried to "work both issues." (WRR8: 41-42).

(26) The Court admitted the trial team's billing records into evidence at the writ hearing. (WRR Applicant's Exh. 6, 9, 11-13). Mr. Lollar and Ms. Ross were not aware whether their billing records were complete. (WRR6: 145; WRR9: 48). Each team member indicated through their testimony that although their billing records include much of the work they do on a case, not all work is listed. Mr. Lollar testified he does not list all the work he does on a case in his billing records; the admitted records do not list everything he did on this case; a portion of his billing from the beginning of the case may be missing; he may have made visits to Applicant that are not listed in these records; and, he had communications with co-counsel that are not listed. (WRR6: 156-160). Mr. Parks testified he does not list all of the work he does on a case in the billing records, and each description does not include everything he did on a particular date. (WRR8: 16-17, 76-78). Mr. Howard testified that he did not list everything he did on this case in his billing records, and his records do not list every defense team meeting. (WRR7: 186-189, 191). Mr. Howard is cognizant of not breaching confidentiality when completing his pay sheets and of not revealing any information to the State about case

preparation, because the billing records are accessible as public records. (WRR7: 187-188). Ms. Ross indicated she expended a lot more time on this case than reflected in her billing. (WRR9: 25-26).

(27) Mr. Parks replaced the former second-chair counsel, Mr. Wilson, on this case. (WRR8: 81). Mr. Wilson's billing records were not offered into evidence in these writ proceedings. There is no evidence before the Court regarding the work Mr. Wilson performed on the case.

(28) The Court finds the billing records do not contain all of the work the trial team undertook in representing Applicant.

(29) The team met and communicated frequently during their representation—in person, by phone, and by email. (WRR4: 76, 130; WRR6: 160; WRR7: 147-148, 188-189, 191; WRR8: 79-80; WRR9: 20). Mr. Lollar testified that he had many phone conferences with Ms. Ross that are not reflected in his billing records. (WRR6: 159-160). During individual voir dire, the attorneys communicated daily, not just about voir dire but also about other aspects of the case. (WRR7: 148, 191; WRR8: 71). Mr. Parks indicated in his testimony that his billing records do not list all team meetings or communications with the team as "team meetings." (WRR8: 71, 73, 79). Ms. Ross testified she had frequent contact with the attorneys. (WRR9: 20).

(30) The American Bar Association's (ABA's) Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases recommend that lead counsel assemble a capital defense team that includes one member qualified by training and experience to screen for the presence of mental or psychological disorders or impairments. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1, 10.4(C), Commentary (2003). Mr. Lollar retained the services of Brendan Ross, a mitigation specialist and social worker, which meets this requirement.

(31) In addition, counsel retained several experts to assist them in the investigation and development of their punishment case.

(32) Counsel retained Dr. Antionette McGarrahan, a forensic neuropsychologist, to evaluate Applicant's intellectual, cognitive, and psychological functioning. Dr. McGarrahan received a Ph.D. in clinical psychology from U.T. Southwestern Medical Center in Dallas in 1999 and participated in a fellowship in forensic psychology at the University of Kansas City, Missouri. (WRR7: 77). She is a licensed psychologist in Oklahoma and Texas. (WRR7: 78). Dr. McGarrahan acted as a consulting expert to the trial team. (WRR4: 75). In addition to evaluating Applicant, she reviewed records and provided analysis of Applicant's life history. (WRR4: 75, 77, 80-83; WRR State's Exh. 7). Dr. McGarrahan attended some of the team meetings. (WRR4: 83; WRR6: 151). She ultimately recommended using family members to describe the mitigating aspects of Applicant's life history, along with use of an expert, Dr. Gilda Kessner. (WRR4: 81; WRR State's Exh. 7).

(33) Trial counsel retained Dr. Gilda Kessner, a licensed psychologist, to testify about childhood risk factors that correlate with violence later in life. (RR65: 155-162; 166-168). She testified that a 10-year-old child with six risk factors is tenfold more likely to engage in violence as an adult than a child with a single risk factor. (RR65: 160). Dr. Kessner's testimony was tied to the mitigation theme that many things Applicant experienced in life were not choices he made, but choices that others made for him. (WRR7: 154).

(34) Trial counsel retained Dr. John Roache, a clinical pharmacologist, to testify about drug addition, particularly related to marijuana and PCP. (RR65: 64- 69). Prior to his testimony, Dr. Roache reviewed some of Applicant's Dallas County jail mental health records. (RR65: 137-139, 142-145). Dr. Roache testified about characteristics of brain function and addiction, ADHD as a risk factor for addiction,

and the possible effects of chronic marijuana and PCP use, including (for PCP) psychosis, paranoia, and even violence. (RR65: 124-144).

(35) The team implemented a strategy of not having Dr. Kessner and Dr. Roache examine Applicant in person. (WRR7: 156).

(36) Trial counsel retained three prison experts. (RR65: 11-19, 24-28, 146-149).
Two of these experts testified before the jury about the classification of inmates in TDCJ and a prison system's ability to control inmate behavior. (RR65: 170-233).

(37) Trial counsel retained an eyewitness identification expert, Dr. Charles Weaver, to testify about a witness's identification in an extraneous double robbery and murder. (WRR4: 98-99; RR64: 155-215). Two men robbed a family in a downstairs apartment, and then one of the assailants went to an upstairs apartment and shot three individuals, killing one. (RR63: 188-209, 232-250). A witness upstairs identified Applicant as the shooter. (RR63: 254-268). Trial counsel used Dr. Weaver to challenge the accuracy of this identification. (WRR4: 98-99).

(38) The trial team explored calling as a witnesses the two Parkland Hospital physicians who treated Applicant while he was in the Dallas County Jail and provisionally diagnosed him with schizophrenia. (WRR7: 155-156). Although the trial team's position was that a treating physician would not open the door to the State calling its expert, Dr. Christine Reed, who had examined Applicant, the Court made it clear in pre-trial proceedings that calling a treating physician could result in the Court allowing the State to call its examining expert to testify. (WRR7: 155-156). The trial team elected not to call the treating physicians for this reason. (WRR7: 155-156).

(39) Determining which witnesses to call are strategy decisions. (WRR7: 154).

(40) Determining the balance and focus of evidence between the two special issues in a death penalty case are strategy decisions.

(41) Based on their experience and qualifications, Mr. Lollar, Mr. Parks, and Mr. Howard were qualified to formulate and execute effective trial strategies.

(42) The Court finds the testimony of Mr. Lollar, Mr. Parks, and Mr. Howard is credible and true.

Trial Counsel Did Not Render Ineffective Assistance by Not Investigating and Presenting Fetal-Alcohol-Spectrum-Disorder Evidence in the Punishment Phase of Trial

(43) Mr. Lollar testified at the writ hearing that he relied on Dr. McGarrahan, his neuropsychological expert, to advise him what issues or impairments Applicant had and how those issues affected his behavior. (WRR4: 136). Dr. McGarrahan advised him that Applicant's deficits were minimal and would not have affected his behavior. (WRR4: 136, 139). Mr. Lollar testified that although Applicant's mother, Pamela Maddox, had told the trial team she drank a couple of glasses of wine on the weekends during the first six or eight weeks of pregnancy, the importance of that type of testimony is affected by the degree to which the witness says she engaged in the behavior. (WRR4: 137). Moreover, Mr. Lollar explained he relied on his expert to explain to him what the issues and areas of concern were with his client. (WRR4: 137).

(44) Mr. Howard testified at the writ hearing that Ms. Maddox had informed the trial team she drank an occasional glass of wine during the first few—maybe first six—weeks of pregnancy. (WRR7: 162). He reviewed the affidavit Ms. Maddox submitted for this writ, and testified it reflects more alcohol intake than what she told the trial team. (WRR7: 162).

(45) Ms. Maddox testified at trial that she drank alcohol and smoked cigarettes and marijuana before she was pregnant and up until the time she learned she was pregnant. (RR64: 222-223). She testified she learned she was pregnant at about six weeks. (RR64: 223). After that, she stopped smoking and drinking. (RR64: 223-224).

(46) In support of his writ claim, Applicant submitted an affidavit with his writ application by Ms. Maddox, dated May 29, 2014, in which she indicates she learned she was pregnant when she was about two months into the pregnancy. (Applicant's Writ Exh. 11, at 1). She also states she "drank a few glasses of wine on the weekends before [she] found out that [she] was pregnant." (Applicant's Writ Exh. 11, at 1-2). She continues, "I stopped drinking when I learned I was pregnant with Roderick. (Applicant's Writ Exh. 11, at 2).

(47) Ms. Maddox testified at the writ hearing that when she was 17, before she knew she was pregnant, she did not drink everyday but she drank Thunderbird and Wild Irish Rose on the weekends. (WRR2: 33). Dr. Julian Davies, one of Applicant's experts for this writ, testified that Thunderbird and Wild Iris Rose are wines that are typically fortified with alcohol to a volume content of about 13 to 18 percent. (WRR3: 47). Ms. Maddox also testified at the writ hearing that she learned she was pregnant at about six weeks. (WRR2: 64-65). Ms. Maddox testified that when she found out she was pregnant she stopped drinking completely. (WRR2: 66).

(48) Mr. Lollar indicated at the writ hearing that Ms. Maddox did not inform the trial team at the time of trial that she drank fortified wines like Thunderbird. (WRR4: 148-149).

(49) The Court finds that, at these writ proceedings, Ms. Maddox expanded the information she provided about the amount and type of alcohol she drank during pregnancy from what she told the defense team during the pre-trial investigation

and even from what she told Applicant's writ counsel in the writ investigation in 2014, as reflected in her affidavit. (*See* WRR3: 87). The Court finds Applicant's trial counsel were not aware of this information because Ms. Maddox failed to reveal it until 2018. The Court finds trial counsel could not have been ineffective for failing to act on information that was not provided to them.

(50) Ms. Ross's billing records reflect more than 30 contacts with Ms. Maddox. (WRR9: 22; WRR Applicant's Exh. 13).

(51) Both defense attorneys in closing arguments at trial, Mr. Howard and Mr. Lollar, emphasized that Applicant suffered from in utero exposure to harmful substances (alcohol and/or marijuana). (WRR4: 149-150; RR66: 44, 46, 63).

(52) Julian Davies, M.D., provided an affidavit and testified in support of Applicant's writ. (WRR3: 24-112; Applicant's Writ Exh. 28). Dr. Davies is a pediatrician with specialties in international adoption, foster care, fetal alcohol spectrum disorder, and the impacts of complex trauma. (WRR3: 34, 77; WRR Applicant's Exh. 2). He is a clinical professor of pediatrics at the University of Washington and has a faculty clinic practice where the majority of patients are fostered or adopted. (WRR3: 35). He is also one of two pediatricians at the University of Washington Fetal Alcohol Syndrome Diagnostic Clinic, which provides diagnostic evaluations for children and adults. (WRR3: 35).

(53) Dr. Davies examined Applicant, reviewed various records, and diagnosed him with Alcohol Related Neurodevelopmental Disorder (ARND), which is one of the Fetal Alcohol Spectrum Disorders (FASD). (WRR3: 42-43, 56, 65, 75; Applicant's Writ Exh. 28, at 11, 14). He based his diagnosis of ARND on the amount and pattern of brain dysfunction Applicant exhibits, the history of prenatal exposure to alcohol (which Dr. Davies describes as "significant first trimester alcohol exposure"), and the results of his differential diagnosis process (of ruling out other etiologies). (WRR3: 76).

(54) Dr. Davies testified that ARND is a permanent birth defect syndrome caused by maternal alcohol consumption during pregnancy. (WRR3: 37, 78; Applicant's Writ Exh. 28, at 1). He explained that alcohol consumption during pregnancy causes brain injury and neurological impairments. (WRR3: 37). ARND is a diagnosis under the FASD that involves a pattern of brain impairments that have been associated with prenatal alcohol injuries. (WRR3: 38-39).

(55) Dr. Davies lists the records he reviewed and relied on in his affidavit. (Applicant's Writ Exh. 28, at 2). These included the affidavits of Dr. James Underhill and Dr. Natalie Brown. (Applicant's Writ Exh. 28, at 2; WRR3: 79-80; WRR6: 87).

(56) In support of his FASD claim, Applicant submitted with his application the affidavit of Dr. Natalie Novick Brown, a psychologist. (Application Exh. 1). Dr. Brown did not testify at the writ hearing; Applicant instead utilized the testimony of psychologist Joan Mayfield. (WRR2: 116). The State moved to strike Dr. Brown's affidavit on the basis she was not appearing to testify (thus there would be no opportunity for cross-examination) and writ counsel had replaced her with another expert. (WRR2: 116). The Court denied the State's request to strike the affidavit but ruled the Court would not consider it for any purpose except to the extent another expert in the hearing relied upon it. (WRR2: 117-118).

(57) Dr. Davies testified Applicant does not have the facial features necessary for a diagnosis of Fetal Alcohol Syndrome or Partial Fetal Alcohol Syndrome, and he does not exhibit a growth deficiency, which is sometimes present in FASD disorders. (WRR3: 75, 85-86).

(58) Dr. Davies testified that no amount of alcohol during pregnancy is safe; any amount of alcohol places a fetus at risk of developing FASD. (WRR3: 50, 88-90). Dr. Davies also testified that it is common for mothers to minimize or

underreport their alcohol consumption. (WRR3: 48-50, 88; Applicant's Writ Exh. 28, at 12). He testified whenever a mother reports prenatal alcohol use, the general direction of error is greater intake than reported, "[s]o it is reasonable to think that whenever you are given a specific alcohol amount that there may have been more." (WRR3: 88). Dr. Davies characterized Ms. Maddox's testimony in the writ hearing as evidencing a "high risk pattern of alcohol exposure." (WRR3: 108).

(59) Dr. Davies considered and ruled out other possible etiologies in Applicant's life which could account for what he diagnosed as significant neurological damage, including (a) the fetal distress and asphyxia Applicant experienced at birth from the umbilical cord being wrapped around his neck, which required two minutes of resuscitation; (b) the car accident Applicant was in at age two which resulted in facial lacerations and a loss of consciousness; (c) possible childhood lead exposure; and (d) other adverse childhood experiences including his mother being depressed and emotionally distant, being left to be cared for by others early in life while his mother was partying, experiencing parental alcohol and marijuana use in his presence during his early years, witnessing domestic violence, and being subjected to corporal punishment. (WRR3: 51-55, 92-96; Applicant's Writ Exh. 28, at 14).

(60) Dr. Davies testified that children with FASD have difficulties with behavior and cognitive abilities in childhood. (WRR3: 57). He concluded Applicant exhibited a pattern of behavioral and developmental challenges consistent with what he sees in the fetal alcohol syndrome clinic. (WRR3: 56-57). Dr. Davies noted that Applicant's Attention Deficit Hyperactivity Disorder (ADHD), diagnosed at age seven, represents a significant area of brain dysfunction. (WRR3: 56, 58, 60). Dr. Davies reviewed Dr. James Underhill's neuropsychological test scoring of Dr. McGarrahan's raw test data in order to look at different domains of brain function and possible areas of impairment. (WRR3: 59-60). Dr.

Davies concluded the neuropsychological testing shows Applicant has significant impairment in memory and his executive functioning is an area of concern. (WRR3: 60- 61). He explained that one of the hallmarks of brain injury caused by alcohol is significant variability in test scores, with some in the typical range and others showing significant areas of impairment. (WRR3: 61). Dr. Davies noted that school personnel diagnosed Applicant with a learning disability in math, which is another area of significant impairment. (WRR3: 62). Regarding IQ testing, he testified he often encounters a significant split between the Verbal Comprehension Index and the Perceptual Reasoning Index in FASD patients—like the split evident in Applicant's testing. (WRR3: 63).

(61) Dr. Davies testified that during his examination Applicant self-reported a history of significant problems with anger management; mood swings related to feeling neglected by his mother; high levels of impulsivity, inattention, and hyperactivity; symptoms of anxiety like compulsive neatness, hand washing, and checking things; problems with lying; and sensory sensitivities like bright lights and being touched. (WRR3: 69).

(62) Dr. Davies relied on Dr. Underhill's score report of Dr. McGarrahan's raw test data. (WRR3: 80-81). He testified that information regarding malingering, test performance, fatigue during a testing session, distractions, and a person's current medications and mental health might influence a testing session. (WRR3: 81-82, 91).

(63) Dr. Davies testified he conducted a Montreal Cognitive Assessment of Applicant, which is a cognitive screening tool. (WRR3: 72-75, 90). He testified Applicant failed the assessment, earning 21 out of 30 points, with a normal score being 26 or above. (WRR3: 73). A portion of the test is a naming task with animal pictures—of a lion, rhinoceros, and camel. (RR3: 74; WRR State's Exh. 1). Applicant earned two

of the three points in this section because he identified the camel as an emu. (RR3: 74; WRR State's Exh. 1). Applicant also lost one point for not knowing the correct year. (WRR State's Exh. 1). Dr. Davies did not perform any effort testing or tests of malingering, but he emphasized in his testimony that his impression was Applicant was giving full effort. (WRR3: 75, 90-91).

(64) Dr. Davies stated in his affidavit that prenatal exposure to alcohol can cause lower IQ, ADHD, difficulties with judgment and impulse control, language and social difficulties, learning disabilities, memory problems, and impairments in cognitive skills like flexibility, planning, organization, inhibition, and problem solving. (Applicant's Writ Exh. 28, at 1). He admitted in his testimony, however, that these outcomes could be consistent with a number of disorders or environmental factors. (WRR3: 79).

(65) Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure (ND- PAE) is a diagnosis contained in the "Conditions for Further Study" portion of the DSM-5.[5] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 798 (5th ed. 2013) (DSM–5). (WRR3: 99-100, 109-110). The proposed criteria for diagnosis includes "more than minimal exposure to alcohol during gestation, including prior to pregnancy recognition." DSM-5, at 798. The discussion of prenatal alcohol use in the DSM-5 manual includes:

> Although both animal and human studies have documented adverse effects of lower levels of drinking, identifying how much prenatal exposure is needed to significantly impact neurodevelopmental

[5] The DSM-5 also includes a disorder called "Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure," which is included as an "Other Specified Neurodevelopmental Disorder." DSM-5, at 86. This disorder which is in the main body of the DSM-5, however, does not list any specific diagnostic criteria separate from other neurodevelopmental disorders. The only reference in the DSM-5 to the amount of alcohol use relevant to prenatal alcohol exposure is in the diagnosis for "Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure" in the "Conditions for Further Study." DSM-5, at 798-799.

> outcomes remains challenging. Data suggest that a history of more than minimal gestational exposure (e.g., more than light drinking) prior to pregnancy recognition and/or following pregnancy recognition may be required. Light drinking is defined as 1-13 drinks per month with no more than two of these drinks consumed on any one drinking occasion.

DSM-5, at 799. (RWW3: 109-110).

(66) Post-conviction counsel retained Dr. Joan Mayfield in this case to review the reports of Dr. Davies and Dr. Brown and determine if Dr. McGarrahan's testing was consistent with their opinions; she found it was. (WRR6: 15). She disagrees with the opinion that Dr. McGarrahan's testing shows little or no cognitive impairment. (WRR6: 15, 56).

(67) Dr. Mayfield has a Ph.D. from Texas A&M University; her focus is in child clinical and neuropsychology. (WRR6: 17). From 1996 to 2015, she was a pediatric neuropsychologist at Our Children's House, a pediatric specialty hospital, at Baylor Hospital. (WRR6: 18). She has experience diagnosing children with FASD. (WRR6: 17-19).

(68) Dr. Mayfield has testified in court about 10 or 12 times. (WRR6: 17). She has never been retained by the State, and she has testified for the defense in a criminal case about five times. (WRR6: 37).

(69) Dr. Mayfield did not perform any testing of Applicant, meet and evaluate Applicant, or diagnose Applicant. (WRR6: 50-51). She did not review Dr. McGarrahan's raw testing data to prepare for her testimony in the writ hearing. (WRR6: 41).

(70) Dr. Mayfield examined Applicant's history and testing profile for characteristics consistent with FASD. (WRR6: 39, 69). She concluded his test scores are consistent with an FASD diagnosis, but she cannot say they are conclusory for FASD. (WRR6: 51, 66).

(71) Dr. Mayfield's testimony at the writ hearing included her opinion that, if she had tested Applicant, she would have conducted a few of Dr. McGarrahan's tests differently and she would have completed some additional testing in the areas of executive functioning, attention and listening, math reasoning, receptive language, and memory. (WRR6: 23, 26-27, 30-31, 34, 51).

(72) Dr. Mayfield did not perform the additional testing she recommends, and Applicant does not present any evidence the additional testing would have altered the outcome of his testing.

(73) From Dr. McGarrahan's testing, Dr. Mayfield noted Applicant had substantial attention problems on one of six categories of the Wisconsin Card Sorting Test—and attention problems are consistent with FASD. (WRR6: 24-25, 27-28). She noted that a higher percentage of people diagnosed with FASD have learning disabilities, particularly in math. (WRR6: 29). She explained that Applicant's 15-point discrepancy on the WAIS-IV between his Verbal Comprehension Index of 81 and Perceptual Reasoning Index of 96 is significant because math reasoning is language based; Applicant's lower verbal performance is reflective of a deficiency in math, due to the language component of math reasoning. (WRR6: 29-30, 43, 56-57). She testified that research shows children diagnosed with FASD have a higher propensity to have a split between their verbal IQ score and performance IQ score. (WRR6: 30, 36). She also concluded Applicant's memory testing showed "low average to below average to most of them significantly impaired." (WRR6: 34-35).

(74) Dr. Mayfield testified that the significant problems she identified in Applicant's testing were the split between his Verbal Comprehension Index of 81 and Perceptual Reasoning Index of 96, his history of learning disabilities, one executive functioning score evidencing attention problems, and memory difficulties exhibited on the Wechsler memory test, California Verbal Learning Test (CVLT), and Rey-Osterrieth test (Rey-

O). (WRR6: 56-57).

(75) In forming her opinions, she did not consider Applicant's chronic marijuana use, perhaps beginning as early as age 10, or his daily PCP use, from his teens until the time of this offense. (WRR6: 38-39, 44). On cross- examination, she testified that chronic marijuana and PCP use could affect neurocognitive functioning, including causing memory problems and extensive processing problems. (WRR6: 38-39).

(76) Dr. Mayfield readily admits that conditions other than FASD can cause ADHD; experts do not know if FASD causes ADHD; experts do not know if FASD causes learning disabilities; and many circumstances in a person's childhood could contribute to disabilities like ADHD and learning disabilities. (WRR6: 40).

(77) Dr. Mayfield did not see any evidence of malingering in Dr. McGarrahan's full neuropsychological battery. (WRR6: 46-47).

(78) Dr. Mayfield did not know if any of the test scores she considered were influenced by Applicant being fatigued; if fatigue were a factor, it could change some of her opinions. (WRR6: 51-54).

(79) The trial team retained Dr. McGarrahan to examine and evaluate Applicant prior to trial. (WRR7: 58). Dr. McGarrahan is a licensed psychologist who specializes in forensic and neuropsychology. (WRR7: 57). She examined Applicant on July 5 and October 13, 2011. (WRR7: 86).

(80) Dr. McGarrahan conducted psychological and cognitive testing of Applicant. (WRR7: 58). She reported to the trial team that her testing showed "very little, if anything, in the way of cognitive impairment;" in other words, Applicant exhibited "mild reductions in performances in some areas at most." (WRR7: 80, 84, 105; WRR State's Exh. 7). At the writ hearing, Dr. McGarrahan explained that the testing did

not show significant cognitive impairment. (WRR7: 85). She also explained that most of Applicant's neuropsychological profile is consistent with his low average intellectual abilities. (WRR7: 80-81). Applicant exhibited some mild problems with respect to memory. (WRR7: 81).

(81) Dr. McGarrahan's testing revealed Applicant to be in the low average range of intellectual functioning. (WRR7: 103). He had some scattered scores above the low average range and some scattered scores below the low average range: this is to be expected. (WRR7: 103-105).

(82) Dr. McGarrahan believes the cognitive portion of Applicant's testing was valid; however, he exhibited faking or malingering of psychiatric symptoms. (WRR7: 59-60).

(83) Applicant's writ counsel, the Office of Capital and Forensic Writs and the law firm of Kirkland & Ellis, retained Dr. McGarrahan for the writ proceeding, in conjunction first with the investigation related to filing the writ and second to consult with counsel and testify at the writ hearing. (WRR6: 167; WRR7: 58).

(84) Dr. McGarrahan originally scored the raw data she generated from Applicant's testing and created a score sheet. (WRR7: 95; WRR State's Exh. 17). She provided the raw data and score sheet to Dr. Underhill when directed to by the Office of Capital and Forensic Writs. (WRR7: 95-96).

(85) Applicant called Dr. McGarrahan to testify as a witness at the writ hearing. (WRR7: 57). Dr. McGarrahan testified she has consulted on hundreds— perhaps close to one thousand— criminal cases during her 18 years practicing forensic psychology and neuropsychology. (WRR7: 77).

(86) Dr. McGarrahan testified that FASD is a neurocognitive condition that neuropsychologists come in contact with on a regular basis; in her examinations, she looks for cognitive impairment related to FASD or any other neurological condition. (WRR7: 60-61). She is qualified to diagnose FASD.

(WRR7: 67). She testified that her cognitive testing of Applicant is consistent with a number of conditions that could be related to brain impairment, including FASD, ADHD, a prenatal developmental issue, head injury, or a variety of other things. (WRR7: 61). Applicant's neuropsychological pattern reflects a pattern that is fairly common in cases of memory impairment; his pattern is not specific to FASD. (WRR7: 61).

(87) Dr. McGarrahan is aware that any alcohol exposure in utero presents a risk to a fetus. (WRR7: 69-70).

(88) Dr. McGarrahan testified that prior to her evaluation, the trial team did not have confirmation Ms. Maddox drank alcohol during her pregnancy— because Ms. Maddox was denying alcohol use during pregnancy. (WRR7: 61-62).Dr. McGarrahan explained at the writ hearing that fetal alcohol exposure was a concern in this case; therefore, the team set up additional time for Dr. McGarrahan and Ms. Ross to meet with Ms. Maddox and Applicant's maternal grandmother in order to narrow down whether Ms. Maddox used drugs or alcohol—specifically alcohol—during pregnancy. (WRR7: 66-67; WRR9: 22-23, 42).

(89) Dr. McGarrahan testified that Ms. Maddox indicated that during the first three months of her pregnancy she may have used some alcohol but not much. (WRR7: 68-69).

(90) At trial counsel's request, Dr. McGarrahan prepared a memo to Mr. Lollar and Mr. Parks, dated May 14, 2012, explaining the pros and cons of presenting her testimony at trial in Applicant's punishment phase. (WRR4: 77, 138-139; WRR7: 78; WRR State's Exh. 7). The memo was the culmination of many months of ongoing discussions; Mr. Lollar asked Dr. McGarrahan to document her opinion in May 2012, for his records. (WRR4: 75, 82-83; WRR7: 78-79).

(91) Dr. McGarrahan's opinions from her work on this case included that the results of her neuropsychological exam would not be helpful to Applicant in the punishment phase of his trial because, in part, Applicant exhibited problems with exaggeration and malingering (or faking) of mental illness and psychiatric symptoms. (WRR7: 79, 81; WRR State's Exh. 7). Additionally, although jail personnel had documented a diagnosis of schizoaffective disorder for Applicant, Dr. McGarrahan would have to testify that in her opinion Applicant does not suffer from a severe mental disease, such as schizophrenia spectrum disorder or bipolar disorder. (WRR7: 79-80, 82; WRR8: 49; WRR State's Exh. 7). Dr. McGarrahan would also have to testify if asked that Applicant meets the diagnostic criteria for Antisocial Personality Disorder. (WRR7: 80; WRR State's Exh. 7). Accordingly, Dr. McGarrahan believed her testimony could potentially be more harmful than helpful to Applicant. (WRR7: 82; WRR State's Exh. 7).

(92) The State's retained psychologist at trial, Dr. Christine Reed, had examined Applicant prior to trial pursuant to the State's *Lagrone*[6] motion and was ready to testify if Applicant called an expert to the stand who had examined him. (WRR4: 85-87; WRR7: 154-156, 163). Dr. McGarrahan opined at the writ hearing that it would not be beneficial to Applicant for her testimony (particularly in light of the fact Applicant meets the diagnostic criteria for Antisocial Personality Disorder and that he was possibly malingering mental illness during her exam) to open the door for Dr. Reed to testify and bring up not only the information Dr. McGarrahan believed was potentially harmful but a possible determination Applicant was a psychopath or had psychopathic tendencies, which would go toward him being a potential danger to society. (WRR7: 81; WRR State's Exh. 7).

[6] *See Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997).

(93) The State's expert, Dr. Reed, was waiting in the wings to testify in the State's punishment rebuttal case at Applicant's trial if his team called an expert to testify who had examined him. (WRR7: 154-156, 163). Calling a defense expert to testify who had examined Applicant would also have placed Dr. Reed's report in the State's hands. (WRR7: 155).

(94) Dr. McGarrahan is familiar with Dr. Reed's reputation and knows she is well respected. (WRR7: 83).

(95) The decision whether to call an expert who had examined Applicant in person is a strategy decision. (WRR4: 87-89; WRR7: 81-82, 154-156; WRR8: 51). The trial team must consider not only the benefit received from the testimony of Applicant's examining expert but also the detrimental evidence that may come in through that expert, along with the detrimental evidence that may come in through a competing expert called by the State to testify in rebuttal. (WRR7: 154-156). If Applicant uses an examining expert to present evidence or an expert who has relied on an examining expert, the State may present competing expert testimony.

(96) The defense team's decision not to call an expert who had examined Applicant was a strategy decision.

(97) Dr. Underhill created a list of tests Dr. McGarrahan gave Applicant from Dr. McGarrahan's raw data. (Application Exh. 6). Dr. Underhill's list does not include the Structured Interview of Reported Symptoms (SIRS) test that Dr. McGarrahan administered on October 13, 2012; this is an error in his report of Dr. McGarrahan's work. (WRR6: 121; WRR7: 97, 99).

(98) On July 5, 2011, Dr. McGarrahan did malingering testing of Applicant using the Test of Memory Malingering, the word choice test, the Dot Counting test, and the reliable digit span, which is an imbedded measure (meaning it is part of

an IQ test, not a separate measure). (WRR7: 97). These tests evaluate performance validity, which is about general effort on cognitive tests. (WRR7: 98).

(99) On October 13, 2011, Dr. McGarrahan performed additional testing of Applicant to evaluate symptom validity because the trial team had concerns he was malingering. (WRR7: 94, 98). She conducted the SIRS on that date: it showed a high probability of malingering with respect to mental illness. (WRR7: 99).

(100) Other experts who relied on Dr. Underhill's report, either directly or through another expert, did not have the results of the SIRS test that Dr. McGarrahan performed as part of Applicant's neuropsychological profile; this could have impacted how they viewed the full neuropsychological battery. (WRR6: 122; WRR7: 100-101, 103; Application Exh. 6). This includes Dr. Natalie Brown, Dr. Thomas Dydek, Dr. Courtney Robinson, Charles Rotramel, Laura Sovine, Dr. Julian Davies, Dr. Jeffrey Lewine, and Dr. Joseph Wu. (Application Exh. 1-5, 28; Lewine Report; Wu Report).

(101) Dr. McGarrahan and the State's writ expert Dr. Jed Falkowski testified at the writ hearing that Applicant exhibited significant indicators of malingering mental illness during his testing, as documented on the SIRS and MFAST. (WRR6: 118-122; WRR7: 100-101).

(102) Dr. McGarrahan testified it is problematic to explain to a jury that a person can perform satisfactorily on performance validity testing, reflecting effort and motivation to do well, and simultaneously be exaggerating and malingering in other areas. (WRR7: 101). In Dr. McGarrahan's opinion, a jury may view a person who malingers mental illness to be a manipulator. (WRR7: 101-102). Applicant's jail psychiatric records likewise reflected he exaggerated mental illness symptoms to manipulate and for purposes of medication and attention seeking. (WRR7: 102).

(103) Evidence Applicant was malingering mental illness during his own expert's exam in the pre-trial phase, even if the malingering went to symptom validity as opposed to the cognitive testing, would not have been favorable to Applicant if introduced in the punishment phase of trial. (WRR6: 123; WRR7; 97-101).

(104) On July 5, 2011, Dr. McGarrahan did not administer the delayed recall portion of the Rey-Osterrieth (Rey-O) test to Applicant because he indicated he was fatigued, was not feeling well, and was essentially done with testing at that point; this was reflected by a note in her raw data. (WRR6: 95-97; WRR7: 106-107). To also indicate this, she marked multiple "Xs" through that line on the score sheet. (WRR7: 106; WRR State's Exh. 17). Because the test was discontinued, Applicant did not receive a score on this test. (WRR654-55; WRR7: 107). Dr. Underhill, however, reported the score as a zero; this is an error. (WRR6: 97; WRR7: 106-107; Application Exh. 6, at 13). A zero on this test, on which a person can score between zero and 36 points, if accurate, would indicate severe impairment in delayed memory. (WRR7: 107-108).

(105) Other experts who relied on Dr. Underhill's score report of a zero on the delayed recall portion of the Rey-O test as evidence of memory impairment, particularly Dr. Brown and Dr. Davies, relied on incorrect information. (WRR3: 59-61; WRR6: 95-99, 106, 139; WRR7: 108-110; Application Exh. 28, at 6). Relying on this erroneous test score would affect an expert's conclusions. (WRR6: 95-99).

(106) During Dr. McGarrahan's evaluation, Applicant also exhibited fatigue during the delayed administration portion of the California Verbal Learning Test (CVLT), a test of verbal learning and memory. (WRR6: 98; WRR7: 109). Because Applicant was becoming very sleepy, his effort should be considered at that point, and must be taken into account when analyzing the score. (WRR7: 109-110). Applicant did poorly on this test—reflecting mild to moderate

impairment. (WRR7: 110). Dr. McGarrahan indicated that Applicant's fatigue must be factored into a determination of the degree to which his performance actually reflects significant impairment in memory. (WRR7: 110).

(107) Other experts who relied on Dr. Underhill's score report for the delayed administration portion of the CVLT as evidence of memory impairment, particularly Dr. Brown and Dr. Davies, relied on a test score that was potentially impacted by Applicant's fatigue during the test administration. (WRR6: 98-99, 106; WRR7: 108-110; Application Exh. 28, at 6-7). Dr. Davies concluded Applicant's performance on this test reflected significant impairment. (Application Exh. 28, at 6-7). Failure to consider the impact of fatigue, which may have reduced Applicant's performance on this test, is problematic and may have resulted in misinterpretation of the test results. (WRR6: 98-99; WRR7: 110).

(108) Dr. McGarrahan administered a number of tests and subtests that measure executive functioning, or frontal lobe skills. (WRR7: 110-114). Based on all of this testing, Dr. McGarrahan does not believe Applicant has impairment in executive functioning. (WRR7: 114). His score on only one test, the similarities subtest of the WAIS-IV, was lower than what she expected based on his overall functioning, but that might be due to his language difficulties rather than frontal lobe dysfunction. (WRR7: 112, 114-115). After reviewing each test related to executive functioning during her testimony, she concluded that, overall, he did fairly well on executive functioning: she views the results as where she would expect them to be in some instances, given his IQ, and he exhibited some areas of strength within the executive functioning domain. (WRR7: 110-115). She would not characterize his abilities as reflecting significant impairment in executive functioning. (WRR7: 115).

(109) Regarding her testing of Applicant, Dr. McGarrahan concluded: "Really, the only areas that I saw potential deficits were in complex memory. And both of those tests, the CVLT

and the Rey-O, were the tests that were being administered when [Applicant] was tired and fatigued." (WRR7: 116).

(110) Dr. McGarrahan's testing reflected a 15-point split between Applicant's Verbal Comprehension Index of 81 and Perceptual Reasoning Index of 96 on the WAIS-IV IQ test. (WRR7: 116; WRR State's Exh. 17).

(111) Applicant reported to Dr. McGarrahan that he began using PCP at age 13, and, beginning at age 19, used drugs all day every day, including PCP and marijuana. (WRR7: 92-93). Dr. McGarrahan testified at the writ hearing that Applicant's history of PCP use could contribute to his attention, concentration, and memory problems. (WRR7: 117-118). His history of PCP use, in its entirety, could also account for the memory problems he exhibited. (WRR7: 119).

(112) Dr. McGarrahan testified that the pattern of results she saw in Applicant's testing profile could be attributable to a variety of things, including his ADHD, depression, emotional influences, things he was potentially exposed to in utero, genetic abnormalities, the head injuries he reported, his educational environment, being raised in a disadvantaged environment, or his PCP use. (WRR7: 118-119). She testified "[w]e have no way of really knowing" which of these accounts for Applicant's profile. (WRR7: 118).

(113) Dr. McGarrahan testified that PCP is a hallucinogen and is not a soothing drug. (WRR7: 119-120).

(114) Dr. McGarrahan did not believe Applicant needed additional psychological or medical tests after she completed her seven hours of testing with him. (WRR7: 124). Her examination tests for neurological deficits that are due to a medical neurological condition and tends to encompass all cognitive areas. (WRR7: 124). She did not have a reason to recommend to the trial team that Applicant receive an MRI. (WRR7: 124). Applicant did not have sufficient cognitive impairment on the neuropsychological testing to warrant an MRI. (WRR7: 124-

125).

(115) Mr. Lollar testified that if Dr. McGarrahan had recommended further testing, he would have pursued that testing. (WRR4: 83).

(116) The State retained psychologist Jed Falkowski to testify in this writ proceeding. Dr. Falkowski has a Ph.D. in clinical psychology from U.T. Southwestern Medical Center in Dallas with an emphasis in neuropsychology; he practices forensic psychology in criminal and civil cases. (WRR6: 70-71, 76, 78; WRR State's Exh. 9). He participated in a clinical neuropsychology fellowship at the University of Colorado School of Medicine. (WRR6: 76). He is a licensed psychologist in Texas and Colorado. (WRR6: 76). He reviewed a number of records in this case describing Applicant's history including school, medical, juvenile, and criminal records, along with materials prepared in support of Applicant's writ. (WRR State's Exh. 13).

(117) Dr. Falkowski reviewed Dr. McGarrahan's testing and raw data in this case and re-scored the tests. (WRR6: 79-81). He testified that Dr. McGarrahan's score report was accurate and was largely consistent with his own scoring. (WRR6: 81). He explained that, generally, the testing reflected Applicant has below average intellectual functioning and academic abilities consistent with his level of functioning. (WRR6: 81). Applicant's full scale IQ score on the WAIS-IV is 84, which is in the "below average" range of intellectual functioning. (WRR6: 81). Applicant had a few scattered low scores, as would be expected, but some of these were attributable to testing factors at the time of the evaluation. (WRR6: 81, 83-85). Dr. Falkowski agrees that the testing reflects little if any cognitive impairment. (WRR6: 81-82).

(118) The bulk of Applicant's scores are consistent with his overall abilities in the low average IQ range of 80 to 89 and consistent with his educational attainment. (WRR6: 82-83). It is quite common for an individual with low average IQ to

have some impaired scores. (WRR6: 82-83, 108). The scattered impaired scores do not necessarily mean Applicant has neurological damage. (WRR6: 83-84).

(119) Dr. Falkowski testified that—setting aside potential issues of fetal alcohol or lead exposure—Dr. McGarrahan's test results are consistent with Applicant's history. (WRR6: 86).

(120) Dr. Falkowski opined that Dr. McGarrahan's testing results did not reveal any red flags that Applicant needed further testing. (WRR6: 85-86).

(121) Dr. Falkowski testified that a 15-point spread between the Verbal Comprehension Index and Perceptual Reasoning Index on the WAIS-IV is not necessarily indicative of brain dysfunction or neurological damage. (WRR6: 87-88). He explained that this 15-point spread is quite common in the general population: the likelihood of a person having a 15-point spread between these two indices is 20 percent. (WRR6: 88-89). Therefore, of a sample of 100 neurologically healthy individuals, 20 would have a 15-point spread between these indices. (WRR6: 88-89). This data is contained in the manual for the WAIS-IV test and in research studies. (WRR6: 89). Ten to 13 percent of the population, like Applicant, have the specific split where the verbal index is the lower score and the perceptual reasoning index is the higher score. (WRR6: 89-90). The 15-point spread is not specific to FASD and is not necessarily driven by brain dysfunction; there are many etiologies or causes, including the person's general strengths and weaknesses or the quality of a person's education. (WRR6: 94).

(122) Dr. Falkowski testified that not only was Dr. Underhill's scoring of the delayed portion of the Rey-O incorrect (when he scored a test which was not administered as a zero), but also an evaluator should consider whether fatigue played a role in Applicant's score of moderately impaired on the immediate recall portion of the test, since the entire evaluation was discontinued shortly thereafter. (WRR6: 95-

98).

(123) Dr. Falkowski testified that Dr. Brown and Dr. Davies relied primarily on one low score (which fell below one percentile) on a single subset in the Wisconsin Card Sorting Test as evidence of Applicant's impairment in executive functioning. (WRR6: 100-101). Dr. Falkowski disagrees with Dr. Brown, Dr. Davies, and Dr. Mayfield's interpretation of this subtest because it is an embedded performance validity measure that assesses a person's effort or motivation or task engagement on a particular task. (WRR6: 101). In short, Applicant scored very poorly on a subtest that measures effort, and he did well on the other subcomponents of the Wisconsin Card Sorting Test. (WRR6: 101-102). Therefore, Dr. Falkowski concluded Applicant's low score on the one subtest might not be indicative of neurological dysfunction: it may simply be related to effort or motivation on that particular subtest. (WRR6: 102).

(124) Dr. Falkowski concluded that, other than the one low score on a subset of the Wisconsin Card Sorting Test, Applicant performed in the average and above average range in executive functioning; because his general abilities are in the low average range, executive functioning is a relative strength for him. (WRR6: 102-105).

(125) Dr. Falkowski testified that results from both sessions of Dr. McGarrahan's testing showed Applicant was over reporting psychotic-type symptoms, feigning, and malingering. (WRR6: 118-121).

(126) Dr. Falkowski testified that habitual and extensive drug use could contribute to low test scores, even if a person has abstained from use for a period. (WRR6: 125).

(127) Dr. Falkowski testified that etiologies other than prenatal alcohol or toxin exposure could produce the pattern of results seen in Applicant's testing, including fatigue in the testing environment, being disengaged from a task during

testing, having poor quality of education, or chronic substance abuse. (WRR6: 125-126).

(128) The Court admitted into evidence at the writ hearing several research articles supporting Dr. Falkowski's opinions in this case. (WRR6: 90-94; WRR State's Exh. 10-12).

(129) The State's expert at trial, Dr. Reed, is a clinical and forensic psychologist. (WRR4: 5-6, 9, 13-14; WRR State's Exh. 2). She is a licensed psychologist in California and Texas. (WRR4: 13). She estimated she has been retained in forensic cases several hundred times by the State, court, and defense and has testified in court about 30 times. (WRR4: 10-11).

(130) Pursuant to the Court's *Lagrone* order, Dr. Reed examined Applicant prior to his trial and administered academic, intelligence, and personality testing along with tests of effort and tests of malingering and exaggeration. (WRR4: 7, 16-17; WRR State's Exh. 3). She conducted a clinical interview. (WRR4: 16, 18). Dr. Reed reviewed a number of records relating to Applicant's history. (WRR4: 8, 17; WRR State's Exh. 3, at 2).

(131) Dr. Reed diagnosed Applicant with Psychotic Disorder Not Otherwise Specified, Depressive Disorder Not Otherwise Specified, Cannabis Abuse in Remission in a Controlled Environment, Phencyclidine Dependence in Remission in a Controlled Environment, and Antisocial Personality Disorder. (WRR4: 6, 29; WRR State's Exh. 3, at 12). She noted that a diagnosis of Malingering needed to be "ruled out." (WRR4: 6-7; WRR State's Exh. 3, at 12).

(132) Dr. Reed testified at the writ hearing that Antisocial Personality Disorder is a characterological disorder involving a lifetime pattern of behaviors. (WRR4: 31). The criteria for Antisocial Personality Disorder involves a history of engaging in criminal activities, not abiding by the rules of society, aggressive behavior, irresponsibility, lack of remorse, and deceitfulness. (WRR4: 31). In Dr. Reed's experience,

testimony regarding Antisocial Personality Disorder before a jury is detrimental to the defendant. (WRR4: 33).

(133) Dr. Reed concluded Applicant may have been malingering during the exam. (WRR4: 6-7). Malingering is the exaggeration, feigning, or overreporting of psychological symptoms or distress. (WRR4: 7, 26, 62-63). Applicant showed as malingering on two screening measures, but not on a comprehensive measure. (WRR4: 7, 26-27).

(134) Some personality testing of Applicant indicated significant exaggeration and overreporting of symptoms. (WRR4: 27-28).

(135) Dr. Reed concluded Applicant did not have any gross problems with either attention or memory; he appeared within normal limits in those areas. (WRR4: 23). Applicant did not exhibit a Learning Disability in Dr. Reed's testing. (WRR4: 26).

(136) Prior to trial, Dr. Reed provided her report to the Court, and it was sealed. (WRR4: 15). The Court ordered Dr. Reed not to discuss the results of her evaluation with either party; the results would only be made available to both sides if Applicant called a witness to testify at trial who had examined Applicant. (WRR4: 15). The parties did not receive a copy of Dr. Reed's report until during this writ proceeding in 2015, pursuant to an order by this Court. (*See* WRR4: 15-16; WRR State's Exh. 3).

(137) Post-conviction and prior to her testimony in the writ hearing, Dr. Reed reviewed the affidavits of Applicant's experts in this writ, Dr. McGarrahan's raw test data, and the writ application. (WRR4: 8-9, 64-65).

(138) In her testimony at the writ hearing, Dr. Reed characterized her testing as consistent with Dr. McGarrahan's testing. (WRR4: 9).

(139) Dr. Reed received Dr. McGarrahan's raw data (pursuant to a court order) in about 2015; at the same time, she sent her raw data to Dr. Mayfield. (WRR4: 34).

(140) If Dr. Reed had testified at trial, she could have testified to any information contained in her report, some of which would have been detrimental to Applicant. (*See* WRR4: 35). Some of the information conflicted with other information put forth at trial or was contrary to defense themes or theories. This includes that: Applicant reported he did not experience abuse or neglect as a child; he reported he had a good relationship with and was close to family members; he reported no substance abuse problems in his family; he had two fire setting incidents as a child, including setting the grass on fire in a wooded area when he was age 11 or 12; he was a member of the "Bloods" gang from age 14 to 18 or 19; he was involved in 3 or 4 gang-related fights as a teen; in Kindergarten or first grade he used razorblades that another child brought to school to cut his and another child's jacket; he was suspended from school a few times; he was under the influence of PCP when he was in possession of marijuana at school in ninth grade; when he dropped out of high school, he hung out with friends who were selling drugs and involved in gangs; he never sought mental health treatment in his teens or adulthood; he inconsistently reported whether his psychiatric problems of paranoia and hallucinations began before or after initiating PCP use; he was stressed and depressed due to financial problems at the time of this offense; he denied symptoms of mental illness like auditory or visual hallucinations or delusions at the time of the offense; his drug use history includes using PCP and tobacco dipped in formaldehyde every day from age 16 until his arrest; at age 14, he took his mother's car and drove to Longview, Texas; jail mental health records indicate he is "medication seeking;" jail records indicate he has been moved a number of times in the jail due to bullying and threatening other inmates; Applicant denied engaging in bullying and threatening other inmates and described himself as the

victim in these incidents; he initially denied having any disciplinary incidents in the jail but later admitted there were several, including altercations with other inmates; and he reported typically receiving $1500 per month of financial support from various women he had relationships with, and that was how he made his money. (WRR State's Exh. 3, 4).

(141) During this proceeding, the Court allowed Applicant to undergo MRI testing and for both parties to file expert reports related to the testing. (WRR5: 72- 73). Applicant underwent MRI and Diffusor Tensor Imaging (DTI) on January 10, 2019.

(142) On June 12, 2019, Applicant filed reports by Jeffrey Lewine, Ph.D., and Joseph Wu, M.D. regarding their analysis of Applicant's MRI and DTI imaging. These reports were attached as Exhibit A and B, respectively, to Applicant's filing titled "Roderick Harris's Submission of Additional Evidence Pursuant to the Court's November 26, 2018 Order."

(143) Dr. Lewine's and Dr. Wu's reports are not sworn to by affidavit or otherwise. Because the reports are not sworn by affirmation or oath, or verified, the Court does not consider them to carry the same weight as sworn testimony.

(144) On September 16, 2019, the State filed the affidavit of Joshua Shimony, M.D., Ph.D., along with its attachments A through C. Dr. Shimony has been a full time neuroradiologist at Washington University School of Medicine in St. Louis since 2001. He indicates he is also involved in research in the area of DTI, which includes the parameter of Factional Anisotrophy (FA). (Exh. B, Shimony Report, p. 1).

(145) Dr. Shimony's September 12, 2019 affidavit and report indicates he reviewed the MRI images of Applicant's brain that Applicant's counsel provided to the State. (Exh. B, Shimony Report, p. 1). He also reviewed the reports by Applicant's experts, Dr. Lewine and Dr. Wu.

(146) After reviewing Applicant's MRI imaging, Dr. Shimony concluded the "MRI is normal." (Exh. B, Shimony Report, p. 1).

(147) After reviewing Dr. Lewine's and Dr. Wu's reports, Dr. Shimony noted the two experts reach "different, conflicting conclusions" regarding the volumetrics findings (referring to pages 5, 8, 39, and 47-49 of Applicant's filing). Dr. Shimony stated: "The discrepancy between these two analyses is gaping and belies the fact that the underlying numbers present a false sense of scientific accuracy." Applicant's own two experts reached conflicting conclusions: Dr. Lewine found all regions of interest in the brain to be statistically abnormal and small, while Dr. Wu found no areas of the brain to be significantly smaller with the exception of two areas (although Dr. Shimony disagrees with Dr. Wu's interpretation of the data related to those two areas). (Exh. B, Shimony Report, p. 2).

(148) Dr. Shimony also concludes there is again a discrepancy between Applicant's two expert reports regarding the DTI data (referring to pages 6, 11, 39, 40-42, and 51-65 of Applicant's filing). (Exh. B, Shimony Report, p. 2-3).

(149) Regarding findings of the DTI testing, Dr. Shimony reports that Dr. Lewine "presents a picture of widespread abnormality involving 25 of 48 regions [of the brain] with abnormal FA values. On Dr. Wu's interpretation of the DTI testing, Dr. Wu reports a much smaller group of regions with decreased FA, however he also presented regions with increased FA which Dr. Lewine found to have decreased FA. (Exh. B, Shimony Report, p. 2).

(150) Dr. Shimony concludes:

> [T]he application of Volumetrics and DTI in the individual [traumatic brain injury] patient or litigant is outside of the standard practice of medicine and

> neuroradiology and fraught with potential pitfalls. *The large gap in the results presented by Mindset [Dr. Lewine] and by Dr. Wu attest to this fact.* Currently, there are no studies that demonstrate the utility, accuracy or reliability of these methods for the diagnosis in individual patients. Currently DTI is only used in individuals for pre- surgical planning in the case of patients with brain tumors. The error rates of these methods are currently unknown and the variability in equipment, acquisition parameters and analysis software complicates interpretation of these methods in a single individual.

(Exh. B, Shimony Report, p. 5).

(151) Dr. Shimony reports that the American College of Radiology (ACR), the organization that establishes guidelines for the standards of care in the field of Radiology "*does not endorse DTI or Volumetrics for the diagnosis of [traumatic brain injury] in individuals.*" In fact, the ACR explicitly states that DTI is usually not appropriate for the diagnosis of traumatic brain injury. (Exh. B, Shimony Report, p. 4).

(152) Dr. Shimony reports that the "*use of DTI and/or Volumetrics is not widely used and is* ***not*** *generally accepted in the clinical diagnosis of traumatic brain injury (TBI) for individual patients.* At the majority of Level I Trauma hospitals in this country (including the biggest and best academic centers) these methods are not performed on individuals for the diagnosis of TBI since these methods are not reliable for this purpose. None of these well respected academic institutions provide reports on these techniques for individual patients in traumatic brain injury." (Exh. B, Shimony Report, p. 4).

(153) Dr. Shimony concludes that the reported DTI and Volumetric "findings" of Applicant's experts "*present no evidence of an abnormality and are of no consequence.*" He adds, "Given our

current overall lack of understanding of the application of these methods in individuals, it is difficult to make judgments as to what is normal or abnormal, especially in the setting of litigation." (Exh. B, Shimony Report, p. 5).

(154) Dr. Shimony notes in his report that Dr. Wu provides references to extensive DTI literature on brain injury (80 articles); however, all but a few of these articles compare a control group to a group of subjects with brain injury, and not with a single individual, as in the case here. (Exh. B, Shimony Report, p. 3). The few articles that look at individuals are case reports and thus are not considered scientifically valid. (Exh. B, Shimony Report, p. 3). The Court finds that the use of quantitative analysis of volumetrics and DTI on MRI imaging in individual subjects is not a generally accepted practice in the medical community for the clinical diagnosis of brain injury.

(155) The Court finds Dr. Shimony's affidavit regarding Applicant's MRI imaging to be credible and reliable.

(156) Dr. Shimony attaches in Exhibit C a well-known 2013 published report on guidelines for ethical use of neuroimaging in medical testimony, in which the author stated:

> [T]he neuroradiology community has not arrived at a consensus view of the value of DTI in (particularly mild) head trauma. Nonspecific pattern or findings obtained with DTI prohibit the confirmation or diagnosis of mild [traumatic brain injury] with reliability.

C.C. Meltzer et al., *Guidelines for the Ethical Use of Neuroimages in Medical Testimony: Report of a Multidisciplinary Consensus Conference*, Am. J. of Neuroradiology, Aug. 29, 2013.

(157) The Court finds the quantitative volumetric and DTI analysis performed by Dr. Lewine and his colleagues at Mindset is not persuasive or credible. The Court does not find Dr. Lewine's

conclusion that Applicant's "set of quantitative MRI evaluations is markedly abnormal" to be persuasive or credible. (*See* Exh. A, Lewine Report).

(158) Dr. Wu concluded that Applicant's history and MRI DTI and quantitative volumetrics patterns are consistent with diagnoses of brain damage caused most likely by lead toxicity, traumatic brain injury, and fetal alcohol spectrum disorder, based on review of the clinical records and imaging findings. (Exh. B, Wu Report). In considering Applicant's history, Dr. Wu appears to have accepted prior diagnoses related to exposure to lead and alcohol in utero as conclusive.

(159) The Court does not find Dr. Wu's conclusion that Applicant's history and MRI DTI and quantitative volumetrics patterns to be likely caused by lead toxicity and fetal alcohol spectrum disorder to be persuasive or credible. Applicant fails to prove by a preponderance of the evidence that trial counsel was deficient by not further investigating a possible fetal alcohol spectrum disorder and by not presenting that diagnosis to the jury.

(160) There is no single test an expert can give a person to determine if the person has a FASD diagnosis. (WRR3: 84; WRR6: 115; WRR7: 122-123). An FASD diagnosis is based on the clinical judgment of the examiner. (WRR3: 84; WRR6: 115-116; WRR7: 123).

(161) Dr. Davies formed conclusions and diagnosed Applicant with ARND in part based on incorrect test scoring by Dr. Underhill of Dr. McGarrahan's raw data in two important areas.

(162) Dr. Davies seemed to conclude that because Applicant had some alcohol exposure in utero, because any alcohol exposure presents a risk, and because Applicant's neuropsychological testing is in his opinion consistent with ARND, that a diagnosis of ARND is appropriate.

(163) While Dr. Davies addressed other potential etiologies, some of which appeared as significant as Ms. Maddox's prenatal alcohol use, in light of other expert testimony in this proceeding the Court does not find his ready dismissal of those possible etiologies to be credible. (*See* Application Exh. 28, at 13).

(164) Dr. McGarrahan testified that confirmation bias in testing occurs when an examiner goes in with a preconceived idea about how a person should perform based on the examiner's experiences or knowledge or what the research says. (WRR7: 121-122). Dr. Falkowski testified confirmation bias is when a person searches for things to confirm a previously held hypothesis or idea—such as when an examiner wants to consider whether a person has FASD and looks for things consistent with FASD. (WRR6: 118). Confirmation bias also encompasses a tendency to ignore information that may be inconsistent with a hypothesis or idea. (WRR6: 118).

(165) The Court finds both Dr. Davies and Dr. Mayfield are influenced by confirmation bias. Particularly, Dr. Mayfield approached her analysis in this case based on a referral question by post-conviction counsel to examine Applicant to identify evidence consistent with ARND. Based on the testimony of the expert witnesses in the courtroom, the Court finds this is not the usual approach of a neutral examiner—to review a case to look for circumstances and characteristics of a person consistent with a pre-determined diagnosis. For these reasons, the Court finds Dr. Mayfield's testimony is not persuasive in this case.

(166) At the writ hearing, Applicant presented the testimony of Richard Burr regarding the guidelines for standards of care promulgated by the American Bar Association and Texas Bar Association for practice in a death penalty case, particularly regarding the adequacy of an investigation and reasonableness under the standards. (WRR9: 70).

(167) Mr. Burr received his law degree from the University of Kentucky in 1976. (WRR9: 72). He began capital defense work in 1979. (WRR9: 72). Since 1984, his focus had been representing inmates in Texas who have been sentenced to death. (WRR9: 73; WRR Applicant's Exh. 15).

(168) Mr. Burr did not review the record of the pre-trial proceedings in this case; with the exception of small excerpts, he did not review the trial record; he did not review any of the trial attorneys' or mitigation specialist's billing records; he did not interview anyone on Applicant's trial team; and, he did not review the trial attorneys' or mitigation specialist's trial files. (WRR9: 12-13, 125, 133-134).

(169) To form his opinions in this case, Mr. Burr relied on and reviewed the habeas application, a fact summary of Applicant's writ counsel's investigation in this case, the May 14, 2012 email from Dr. McGarrahan to Mr. Lollar and Mr. Parks, Dr. John Hagedorn's affidavit regarding gang evidence, some excerpts from the punishment phase trial testimony, closing arguments at trial, some of Mr. Lollar's testimony in this writ proceeding, and reports from counsel regarding Mr. Parks' and Mr. Howard's testimony. (WRR9: 10-13).

(170) Mr. Burr testified that counsel's trial files are the best evidence reflecting an investigation in a death penalty case, particularly because they are the only way to document better than the attorneys' memories what they did or did not do. (WRR9: 132-133). Mr. Burr has often reviewed trial files in other cases where he testified as an expert about the standards of care in a death penalty case. (WRR9: 133). Yet, he did not review the trial attorneys' files before forming his opinions or testifying in this case. The Court finds Mr. Burr formed his opinions on limited information. Particularly, he did not speak to the trial attorneys or review any of the trial team's files. Therefore, he was operating from a deficit of information about the investigation made in this case and the factors affecting trial counsel's decisions.

(171) To form his opinions, Mr. Burr relied substantially (in part) on the writ application and a summary of the facts provided by Applicant's counsel, which he did not bring with him when he testified at the writ hearing. (WRR9: 9-13, 13). He appeared to be operating on the belief he was "essentially testifying about facts that were known and established in giving his opinion." (WRR9: 134). However, the facts he accepted as "known and established" were compilations prepared by Applicant's counsel, which the witness did not bring with him to court. (WRR9: 9-10, 13, 134).

(172) Mr. Burr acknowledged it is well established that the ABA and Texas Bar Association guidelines are not law, but guidelines of practice. (WRR9: 126- 127). *See Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (per curiam).

(173) Mr. Burr expressed no opinions regarding the tactical decisions made in this case or the prejudice prong of *Strickland*. (WRR9: 70, 127).

(174) Mr. Burr has known Mr. Parks and Mr. Lollar for a long time and has consulted with them on some of their cases. (WRR9: 117). He believes they are very qualified practitioners. (WRR9: 117-118).

(175) Although Mr. Burr testified he is very familiar with death penalty litigation in the state of Texas, he was not aware that the trial judge in the instant case declared the Texas death penalty scheme unconstitutional. (WRR9: 119- 121, 125).

(176) Mr. Burr testified that he has tried two death penalty cases during his career: the Timothy McVeigh case in federal court and a re-sentencing case in state court in Florida in the early 1990s. (WRR9: 121-123). He has not tried a death penalty case in Texas. (WRR9: 122). The Court finds Mr. Lollar's and Mr. Park's experience trying death penalty cases far exceeds Mr. Burr's experience. (WRR4: 68-69; WRR8: 13; WRR9: 122-123).

(177) Mr. Burr has testified or provided affidavits in at least several post- conviction state and federal death penalty proceedings in which he testifies in support of ineffective assistance of counsel claims; he has never provided testimony in this regard on behalf of the State or Government. (WRR9: 123- 124, 127).

(178) Mr. Burr testified that the standards of care under the ABA and Texas Bar Association guidelines call for a capital trial defense team to have one member who has specialized knowledge about a broad spectrum of mental disorders and can point the team toward an appropriate investigation—although this person is *not* required to be an expert herself. (WRR9: 82, 84- 85, 92, 129-130).

(179) Mr. Burr acknowledged that adequate investigation does not mean counsel must go down every rabbit hole, but in his own opinion if something suggests additional information could benefit the client, counsel should pursue it. (WRR9: 82-83).

(180) Mr. Burr testified that if a client has evidence of prenatal exposure to alcohol and evidence of behavioral manifestations consistent with fetal alcohol exposure, even with a current neuropsychological assessment showing only mild deficits in one domain, counsel needs to keep investigating, because in his opinion a neuropsychological assessment resulting in limited impairment does not negate a diagnosis of a fetal alcohol syndrome disorder. (WRR9: 85-90, 92, 95-96). In Mr. Burr's opinion, a neuropsychological exam is not the only way to confirm a diagnosis of fetal alcohol disorder: he testified it is a tool, but it is not the only tool. (WRR9: 89).

(181) Mr. Burr testified that he took a graduate course in neuropsychology in 1983—35 years ago. (WRR9: 90). He does not, however, conduct neuropsychological testing, have a medical license, or have a psychologist's license that allows him to diagnose an FASD disorder. (WRR9: 91).

(182) Cross-examination of Mr. Burr revealed that sometimes in reviewing a case and providing opinions relating to ineffective assistance of trial counsel, Mr. Burr testifies as to his own recommendations for practice that go above and beyond those contained in the ABA and Texas Bar Association guidelines. (WRR9: 130-132).

(183) The Court finds that a determination whether a neuropsychological examination reflecting limited impairment can rule out a fetal alcohol spectrum disorder is beyond the scope of Mr. Burr's expertise as a licensed attorney. Likewise, the Court finds Mr. Burr's opinion that a neuropsychological exam is not the only way to confirm a diagnosis of FASD is beyond the scope of Mr. Burr's expertise as a licensed attorney.

(184) The Court finds this level of detail in Mr. Burr's testimony regarding an investigation of possible FASD moves beyond the scope of the standards of care recommended by the ABA and Texas Bar Association guidelines in a mitigation investigation to what Mr. Burr's personal recommendations might be under a set of facts.

(185) Mr. Burr, in fact, testified there were no specific prevailing professional norms applicable to a trial counsel's response to evidence of fetal alcohol exposure in the 2009 to 2012 time period. (WRR9: 92).

(186) Mr. Burr testified that it is now nearly the standard of practice in post- conviction death penalty writs of habeas corpus to include ineffective assistance of counsel claims. (WRR9: 127-128).

(187) Mr. Burr acknowledges that when a defendant puts an expert on the stand who has examined him, a State's expert is likely to testify to a diagnosis, such as Antisocial Personality Disorder, that is extremely prejudicial to the defendant. (WRR9: 97-98). He explained that, in his opinion, based on the evolution of the DSM-II to the DSM-5,

Antisocial Personality Disorder is now a diagnosis based on behaviors rather than flawed character (i.e., criminal behaviors, lack of responsibility in relationships, not being truthful, and not respecting other's rights). (WRR9: 98-99). Mr. Burr proposes defense counsel can neutralize the impact of evidence of Antisocial Personality Disorder "by explain[ing] it by virtue of the very mental health problems that . . . are often explanatory of those behaviors," and by helping jurors understand it is not pejorative, and aggravating in and of itself, but simply a classification based on a person's history. (WRR9: 99, 107).

(188) The Court finds Applicant's symptoms which his experts say are consistent with ARND are also consistent with other causes, conditions, or circumstances. The Court finds that, even if all of the evidence presented in this writ proceeding relating to ARND had been presented at trial, the jury would have concluded at best that fetal alcohol exposure may have caused some of Applicant's conditions or characteristics, such as ADHD or a learning disability, but other etiologies could also explain those conditions.

(189) The Court finds trial counsel were not deficient by not presenting a diagnosis to the jury that primarily accounts for underlying conditions such as ADHD, a learning disability, and other conditions when the jury received some evidence about those underlying conditions and circumstances, including that Applicant was diagnosed with ADHD at a young age and participated in special education throughout his schooling.

(190) The Court finds trial counsel are not deficient for not presenting a diagnosis of ARND, which Applicant's experts in this writ allege is based on significant cognitive impairment, when Applicant's neuropsychological expert in the pre-trial phase advised them that based on a full neuropsychological battery, Applicant had little or no cognitive impairment.

(191) Had Applicant presented evidence of a diagnosis of ARND at trial, the State could have presented a psychologist like Dr. Reed or a similar witness to testify that Applicant's cognitive testing revealed little or no cognitive impairment.

(192) Had Applicant presented evidence of a diagnosis of ARND at trial, the Court would have required Applicant to release the raw data and notes the ARND expert relied on in forming his opinions—including Dr. McGarrahan's raw data and notes—to the State's expert. The State's expert could have then testified that the State's and Applicant's pre-trial psychological exams were similar, with both showing little or no cognitive impairment. From this, the jury may have concluded the ARND expert had either misinterpreted the data or interpreted it in such a way to support his own theory.

(193) Evidence Applicant suffered from a permanent neurological condition would have been inconsistent with the defense team's punishment theme that Applicant's violent criminal behavior was due to his PCP use, and such behavior would cease to be a problem in a controlled environment like prison where Applicant would not have access to PCP. (*See* WRR4: 97; WRR8: 39, 41-43).

(194) Even assuming counsel's investigation and failure to present evidence relating to fetal alcohol spectrum disorder was deficient, Applicant fails to demonstrate by a preponderance of the evidence any resulting prejudice. Trial counsel's investigation into alcohol exposure in utero and the lack of presentation of an expert in fetal alcohol syndrome did not prejudice applicant's defense.

(195) The Court finds that even if Applicant's case of ARND had been presented to the jury, the ARND evidence would not have altered the jury's decisions in answering the special issues in the punishment phase.

(196) The weight and credibility of ARND evidence, if presented at trial as presented here, would have had diminished value due to the following additional evidence. Applicant exhibited little or no significant brain impairment during pretrial testing by both parties. Dr. Davies' conclusions about significant cognitive impairment were primarily based on two test- scoring problems, an arguable misinterpretation of the executive functioning domain testing, and without him having knowledge of the fatigue Applicant exhibited during the exam. Applicant's own expert Dr. Mayfield did not examine him or diagnose him with ARND. A State's neuroradiologist expert finds Applicant's MRI imaging to be normal. By applying the quantitative DTI and volumetrics analysis to an individual, Applicant's experts are using the technology in a manner not accepted in the general medical community and not used in major medical centers to diagnosis brain impairment, and the medical association publications and standards advise against it. There is evidence that Ms. Maddox drank as little as a few glasses of wine on the weekends during the first six weeks of pregnancy, which—though any exposure presents risk—is in fact minimal exposure under the guidelines describing minimal exposure in the DSM-V. Also, the jury might have believed that the primary deficit Applicant exhibited during his pretrial testing, a memory deficit, was due to his history of extreme PCP use.

(197) The jury already knew Applicant had a childhood diagnosis of ADHD. The jury already knew Applicant was in special education. The jury already knew Applicant had some childhood mental health problems. The jury already heard evidence of other adverse childhood conditions and circumstances Applicant experienced in addition to these through his family members, Dr. Roache, and Dr. Kessner.

(198) No expert in this proceeding testified Applicant still has a diagnosis of ADHD or a learning disability. The jury could have concluded, therefore, that if fetal alcohol caused these

impairments, they appear to have resolved prior to Applicant's adult psychological testing.

(199) There is no direct link between ARND and Applicant's criminal behavior.

(200) Calling an expert to testify who examined Applicant or relied on another expert's psychological examination would have opened the door to the State gaining access to Dr. Reed's report and to any information Applicant's testifying witness relied on in forming his or her opinion, including Dr. McGarrahan's raw data and notes. Applicant malingered symptoms of mental illness during his exam with Dr. McGarrahan. The trial team had succeeded in placing some evidence Applicant suffered from serious mental illness before the jury, including through family members and Dr. Roache. Juries tend to view a person who fakes mental illness and symptoms of mental illness to be a manipulator. This evidence, though not specifically relevant to the cognitive testing for the ARND testimony, would have been extremely detrimental to the rest of Applicant's case in the punishment phase of trial.

(201) It is not reasonably likely that the outcome of Applicant's trial would have been different even if counsel had presented evidence of fetal alcohol spectrum disorder or ARND in the punishment phase.

(202) In assessing prejudice under *Strickland,* the question is whether it is "reasonably likely" the result would have been different. *Harrington v. Richter*, 562 U.S. 86, 111 (2011); *Strickland,* 466 U.S. at 696. The likelihood of a different result must be substantial, not just conceivable. *Richter*, 562 U.S. at 112.

(203) There is no substantial likelihood that presenting expert testimony like that of Dr. Davies, Dr. Mayfield, Dr. Lewine, or Dr. Wu in support of fetal alcohol spectrum disorder or ARND would have resulted in a different punishment verdict. *See Harrington v. Richter*, 562 U.S. at 111-112;

Strickland, 466 U.S. at 696.

Trial Counsel Did Not Render Ineffective Assistance by Not Investigating and Presenting Childhood-Lead-Exposure Evidence in the Punishment Phase

(204) Applicant presented an affidavit and the testimony of Dr. Thomas Dydek in this writ proceeding. (Applicant's Writ Exh. 2; WRR3: 125-162).

(205) Dr. Dydek is a board-certified toxicologist and licensed engineer with a Ph.D. in Environmental Science and Engineering. (Applicant's Writ Exh. 2, at 1; WRR3: 130). Dr. Dydek has operated his own environmental consulting firm since 1994. (Applicant's Writ Exh. 2, at 1; WRR3: 129).

(206) Dr. Dydek testified that he has been retained as an expert witness in toxicology approximately 250 times, almost always in civil litigation. (WRR3: 132). Dr. Dydek has been deposed fifty times and testified at trial ten times. (WRR3: 133). Dr. Dydek has testified in "one criminal matter" that "was actually kind of a mixture." (WRR3: 125, 154).

(207) Dr. Dydek has never testified in a death penalty case, and has no expertise in the presentation of mitigation evidence in a death penalty case. In fact, when asked whether he understood that the jury determines what evidence is mitigating, Dr. Dydek testified that he did not "really know the details of those things." (WRR3: 162).

(208) Dr. Dydek was retained by the Office of Capital and Forensic Writs in 2014 to provide an opinion about Applicant's childhood exposure to lead. (Applicant's Writ Exh. 2, at 1).

(209) In order to form his opinion, Dr. Dydek reviewed affidavits collected by Applicant's post-conviction counsel from Dr. Brown, Applicant's mother Pamela Maddox, grandmother Shirley Cook, and stepfather Ramon Maddox, and Garland ISD school records from 2003. (WRR3: 127; Applicant's Writ

Exh. 2, at 3-5). Dr. Dydek also reviewed information related to the RSR Corporation lead smelter located in West Dallas and its history of pollution emissions. (WRR3: 144).

(210) Dr. Dydek did not interview Applicant or any of Applicant's family, nor did he review any medical records. (WRR3: 127-128). Dr. Dydek did not consult with any of the experts in this case. (WRR3: 127).

(211) Dr. Dydek presented two primary opinions at the evidentiary hearing: (1) that Applicant more likely than not was exposed to excessive levels of lead in utero and as a small child; and (2) early life lead exposure can result in violent behavior in adults. (WRR3: 126, 144-145).

(212) Dr. Dydek testified Applicant was exposed to lead via the RSR Corporation smelter both in utero, and as a young child. (WRR3: 145-146). According to Dr. Dydek, Applicant's grandmother, Shirley Cook, who lived on Pueblo Street near the smelter, would have been exposed to lead in the air and soil which she would have passed to Applicant's mother, Pamela Maddox, in utero. (Applicant's Writ Exh. 2, at 4). Dr. Dydek also opines Applicant's mother would have been exposed to lead while she lived on Nomas Street near the smelter, and would have passed lead to Applicant in utero. (Applicant's Writ Exh. 2, at 4). Dr. Dydek testified the RSR Corporation smelter ceased operations several months prior to Applicant's birth. (WRR3: 149). Dr. Dydek opined Applicant would have been exposed to lead in the soil while playing outside at his house on Nomas Street, at his grandmother's house on Pueblo Street, at his elementary school, and in Tipton Park where he played as a child. (WRR3: 145-146, 148-149).

(213) Dr. Dydek testified that children are more susceptible than adults to lead exposure, and the brain and central nervous system of the child may be affected. (WRR3: 134). Children who are exposed to lead may develop higher incidences of ADHD and lack impulse control. (WRR3: 136).

(214) Dr. Dydek also noted that there is "quite a large and growing body of scientific evidence that shows that an in utero and/or early childhood exposure to lead can lead to increases in delinquent and violent behavior and rates of criminality when those lead-exposed children grow into teenage and early adult[s]." (WRR3: 136-137). Based on his review of this literature, Dr. Dydek offered the opinion that "it is more likely than not that a child exposed to lead either in utero and/or as a young child is a definite risk factor for later violent, antisocial or delinquent behavior." (WRR3: 139).

(215) Dr. Dydek testified that recent exposure to lead is determined via blood testing, whereas historic exposure to lead is determined by measuring bone lead levels.[7] (WRR3: 141). Bone lead testing is conducted using x-rayfluorescence or "XRF." (WRR3: 141-142).Measurements are typically done using the tibia. (WRR3: 142).

(216) No evidence regarding blood lead testing or bone lead testing of Applicant was presented in this proceeding. Dr. Dydek testified that he was not aware of any testing of Applicant's blood lead levels as a child, or of bone lead testing as an adult. (WRR3: 159).

(217) In his affidavit, Dr. Dydek states that "[a]s a young child, [Applicant] was diagnosed with dysthymia (mild depression) and with ADHD. He was placed in special education classes because he had behavioral issues and a learning disability." (Applicant's Writ Exh. 2, at 5). Dr. Dydek further explained that neuropsychological testing conducted in 2011 revealed Applicant "had an IQ of 84, as well as uncovered evidence of damage to the frontal, temporal, and parietal

[7] On December 4, 2018, Applicant filed a report from Ferne Nilsa Cummings, M.D., titled "Bone Lead Test Result and Interpretation," for Applicant's mother, Pamela Maddox. This Court granted the State's Motion to Strike this report because it was filed by Applicant in contravention of this Court's November 26, 2018 Order. Accordingly, the report was not considered by this Court in this writ proceeding.

lobes of his brain." (Applicant's Writ Exh. 2, at 5). According to Dr. Dydek, these medical conditions and behavioral traits are "correlated and associated with lead exposure." (Applicant's Writ Exh. 2, at 6).

(218) Dr. Dydek testified that ADHD and learning disabilities are multifactorial, meaning that there are multiple "risk factors" for these diagnoses. (WRR3: 162). Dr. Dydek conceded that childhood lead exposure is only one risk factor that is correlated or associated with ADHD and learning disabilities. (WRR3: 162).

(219) Dr. Dydek also conceded that he had not reviewed any medical records that reflected Applicant had structural brain damage. (WRR3: 159). Dr. Dydek testified he was relying on Dr. Brown's affidavit as evidence that Applicant had organic or structural brain damage. (WRR3: 159-160). Dr. Dydek testified he was unaware whether Dr. Brown conducted any psychological testing of Applicant. (WRR3: 160). Dr. Dydek testified he was not aware that the 2011 psychological testing Dr. Brown references in her affidavit was conducted by Dr. McGarrahan, the trial team's neuropsychologist. (WRR3:160). Dr. Dydek did not consult with Dr. McGarrahan and was unaware of her conclusions in this case. (WRR3: 160-161). Dr. Dydek was also unaware the State's expert, Dr. Reed, had evaluated Applicant in 2012 and conducted psychological testing of Applicant. (WRR3: 161). Dr. Dydek was not provided with a copy of Dr. Reed's report and did not consult with her. (WRR3: 161).

(220) Dr. Dydek testified that if any of the information that he relied on in forming his opinion was incomplete or inaccurate, his opinion could possibly change. (WRR3: 161). However, Dr. Dydek acknowledged that he was not qualified to make judgments about "conflicting neuropsychological effects." (WRR3: 161).

(221) There is no specific neurological test which determines absolutely that a person has been exposed to a toxin. (WRR6:

116). A diagnosis that a person has neurological damage from exposure to a toxin like lead is based on clinical judgment. (WRR6: 116).

(222) The trial team sought the opinion of a respected and credentialed neuropsychologist, Dr. McGarrahan, who examined Applicant and concluded he has little or no neurological impairment. (WRR8: 40-41). Dr. McGarrahan's conclusions are inconsistent with a theory that Applicant was exposed to lead as a child—or, if Applicant were exposed to lead, his neuropsychological exam as an adult shows no evidence of that exposure.

(223) Because Dr. Dydek was not provided with Dr. McGarrahan's opinion that Applicant has little or no brain impairment, Dr. Dydek's testimony, if any, suggesting Applicant may have brain damage as a result of childhood lead exposure lacks credibility.

(224) The Court adopts and incorporates the above findings and conclusions related to Applicant's experts Dr. Lewine and Dr. Wu and their analysis of Applicant's brain imaging.

(225) Applicant fails to prove by a preponderance of the evidence any deficiency in trial counsel's failure to investigate and present mitigating evidence related to childhood exposure to toxic levels of lead.

(226) Dr. Dydek opines only that Applicant may have received lead exposure— more likely than not—relying primarily on the geographic location of Applicant and his family, along with dubious conclusions by Dr. Brown, a psychologist who did not testify in this proceeding and who, in interpreting the neuropsychological testing, relied on an incorrect score report by Dr. Underhill and testing for which she had no knowledge of relevant environmental factors. At best, Dr. Dydek relies on neuropsychological testing for which there are conflicting interpretations. There is no medical evidence proving lead exposure.

(227) A Public Health Assessment, from the Agency for Toxic Substances and Disease Registry, that Applicant submits to this Court in support of his claim reflects that not all inhabitants in the neighborhoods surrounding the smelter plant sustained elevated blood lead levels. (Applicant's Writ Exh. 21, at 13- 16). Although counsel could have investigated further and presented evidence to the jury that Applicant and his mother lived close to the smelter plant and more likely than not were exposed to lead, there is no medical evidence to support such a conclusion. Having possibly been exposed— even "more likely than not" having been exposed—is a weak claim to place before a jury. Applicant's own evidence shows that not everyone who lived near the plant sustained lead exposure. The jury likely would have concluded Applicant may—or may not—have been exposed to lead as a child.

(228) Mr. Howard testified at the writ hearing that a relatively weak claim diminishes the impact of every other claim. (WRR7: 163). A toxicologist's opinion that Applicant more likely than not was exposed to toxic levels of lead as a child is a weak claim. Trial counsel testified at the writ hearing that putting on evidence of such a weak claim runs the risk of the trial team losing credibility with the jury. (WRR7: 161-163; WRR8: 48-49). Accordingly, a toxicologist's opinion that Applicant more likely than not was exposed to toxic levels of lead as a child would have diminished Applicant's and his trial team's credibility in front of jury. (WRR7: 162, WRR8: 48-49).

(229) Testimony that childhood exposure to toxic levels of lead is correlated and associated with violent behavior in adulthood would have been harmful to the defense punishment case—in regard to the future danger special issue. The jury could have determined that any violent behavior related to Applicant's childhood exposure to toxic levels of lead was a permanent condition—meaning Applicant would continue to be violent in prison. Likewise, such testimony would have been inconsistent with the defense team's punishment

theme that Applicant's violent criminal behavior was due to his PCP use, and such behavior would cease to be a problem in a controlled environment like prison where Applicant would not have access to the drug. (*See* WRR8: 39, 41-43).

(230) Applicant fails to prove trial counsel is deficient for not presenting such an unsupported theory during the punishment phase of trial.

(231) Calling an expert to testify at trial who relied on neuropsychological testing would have opened the door under *Lagrone* for the State to call its expert to testify. Trial counsel testified that based on the information they had from Dr. McGarrahan indicating Applicant had little or no cognitive impairment, Applicant would expect a State's expert to reach a similar conclusion. (WRR8: 48). Dr. Reed's examination was overall consistent with Dr. McGarrahan's examination. Testimony from the State's expert would have placed information before the jury that was damaging to Applicant's case, including that he had little or no cognitive damage, he was potentially exaggerating psychiatric symptoms, and he had a history of exaggerating psychiatric symptoms.

(232) Based on all of the above findings, even assuming counsel's investigation and failure to present evidence relating to childhood lead exposure was deficient, Applicant fails to demonstrate by a preponderance of the evidence any resulting prejudice.

(233) Trial counsel's investigation into childhood lead exposure and whether Applicant had any resulting significant neurological damage and the lack of presentation of an expert on childhood lead exposure did not prejudice applicant's defense.

(234) Because the expert testimony would have been, at best, that Applicant may have been (more likely than not) exposed to lead, it is not reasonably likely the outcome of Applicant's

trial would have been different even if counsel had presented evidence of childhood lead exposure in the punishment phase.

(235) There is no substantial likelihood that presenting an expert like Dr. Dydek in support of a theory that Applicant suffered from the effects of childhood lead exposure would have resulted in a different punishment verdict. *See Harrington v. Richter*, 562 U.S. at 111; *Strickland*, 466 U.S. at 696.

Trial Counsel Did Not Render Ineffective Assistance by Not Presenting the Testimony of a Social Historian like Laura Sovine During the Punishment Phase of Trial

(236) Applicant presented an affidavit[8] and the testimony of Laura Sovine in this writ proceeding. (Applicant's Writ Exh. 5; WRR2: 105-126; WRR7: 10-56).

(237) Ms. Sovine has a Master's of Science Degree in Social Work with a Clinical Concentration, and is a Licensed Master's Social Worker with an Advanced Practitioner's license. (Applicant's Writ Exh. 5, at 1).

(238) Ms. Sovine works as the Executive Director at Austin Recovery, a non-profit alcohol treatment center. (WRR2: 122). Ms. Sovine is also an adjunct faculty member at the University of Texas, School of Social Services. (WRR2: 123).

(239) Ms. Sovine testified that her area of expertise is in social work with marginalized populations, with most of her direct practice being in jails and prisons. (WRR2: 124).

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[8] At the evidentiary hearing, Ms. Sovine testified that she wrote her affidavit (Applicant's Writ Exh. 5) in partnership with attorney Robert Romig, formerly with the Office of Capital and Forensic Writs. (WRR7: 42). Ms. Sovine testified that she and Mr. Romig co-drafted the document, meaning she would give him input and Mr. Romig would draft the document for her to review. (WRR: 43).

(240) Ms. Sovine has no formal training in capital litigation, and aside from her work in the instant case, Ms. Sovine has only worked on two other death penalty cases, both post-conviction. (WRR2: 126, WRR7: 40-41). Ms. Sovine has testified in one other Article 11.071 post-conviction writ proceeding. (WRR7: 40). Accordingly, Ms. Sovine has never testified in front of a jury.

(241) The Office of Capital and Forensic Writs retained Ms. Sovine to "provide an opinion as to the elements of Applicant's life history that particularly impacted his life trajectory." (Application Exh. 5, at 2).

(242) In order to form her opinion, Ms. Sovine reviewed educational, employment, medical, juvenile criminal, and adult criminal records; witness testimony from trial; and thirteen affidavits[9] collected by Applicant's post- conviction counsel. (Application Exh. 5, at 31).

(243) According to her affidavit, Ms. Sovine interviewed Applicant at the Polunksy Unit on May 13, 2014 for five hours. (Application Exh. 5, at 2). At the evidentiary hearing, Ms. Sovine testified that her interview with Applicant was approximately four hours of "face time." (WRR2: 113).

(244) Aside from her single interview with Applicant, Ms. Sovine did not interview or consult with any other witness in this case, including those experts whose affidavits she relied on in forming her opinions. (WRR2: 108, 114; WRR7: 39-40). Ms. Sovine testified that she accepted all of the information contained in the affidavits as true and correct. (WRR7: 49).

(245) Ms. Sovine considered everything that Applicant told her during her interview with him to be truthful. (WRR7: 49-50). Ms. Sovine testified that she had "no reason to believe he

[9] While Ms. Sovine states in her affidavit that she reviewed the affidavit of Dr. Courtney Robinson in preparing her own affidavit, this assertion lacks credibility. (Applicant's Exh. 5, at 31). Dr. Robinson signed and notarized her affidavit on June 9, 2014, the same day that Ms. Sovine signed and notarized her own affidavit. (Applicant's Writ Exh. 3, 5). The Court acknowledges that Ms. Sovine may have had a draft of the affidavit. (*See* finding number 293 *intra*).

was lying at the time." (WRR7: 49). Ms. Sovine testified that her opinion would not change based on information that Applicant had malingered or exaggerated symptoms of mental illness during psychological evaluations by Dr. McGarrahan in 2011 and Dr. Reed in 2012, and by medical staff while incarcerated in the Dallas County jail prior to Applicant's trial. (WRR7: 50).

(246) Ms. Sovine testified it was her opinion Applicant was a victim for twenty- four years prior to committing this capital murder. (WRR7: 56).

(247) Ms. Sovine testified that Applicant began building "risk factors" prior to birth due to in utero exposure to alcohol and lead. (WRR7: 11). Applicant also developed an insecure attachment between the ages of zero and three. (WRR7: 11). According to Ms. Sovine:

> Parents who themselves have a mental illness, addictions, or are otherwise not sensitive parents tend to raise children with insecure attachments, who have a much lowered capacity for emotional regulation and impulse control, and who seek to control their environment in an unhealthy way to get needs met such as care and belonging. Children with insecure attachments being raised in chaotic and stressful environments, without intervention, will have significant impairments in behavior and general social functioning.
>
> (Application Exh. 5, at 6).

(248) Ms. Sovine testified that Applicant's school experience was also not typical. (WRR7: 11-12). Ms. Sovine explained that Applicant "exhibited some very severe behavior issues and was diagnosed very early with major mental health disorders that were also not treated." (WRR7: 11-12). According to Ms. Sovine, Applicant was "punished rather

than receiving appropriate treatment from any kind of standard in any kind of mental health profession, and that all of this compounded to affect his adverse life outcomes." (WRR7: 11-12).

(249) In regard to Applicant's gang involvement, Ms. Sovine testified to the following:

> There was like a youth gang that he was apparently jumped into that was – my understanding was sort of a neighborhood gang of kids, like sort of identified as being from a particular area. That was kind of a way that they grouped up and the way that they found protection and kind of alliances with each other.
>
> (WRR7: 30).

(250) Ms. Sovine testified that she only spoke briefly with Applicant about his gang membership; Applicant did not tell her the name of the gang was the Fish Trap Bloods. (WRR7: 45). Ms. Sovine testified that she had no familiarity with the Fish Trap Bloods. (WRR7: 45). She testified it was her "understanding that the youth gang did participate in some petty criminal behavior." (WRR7: 46).

(251) Ms. Sovine did not read Detective Nelson's trial testimony, and she did not report any knowledge of Applicant's gang-related tattoos. (WRR7: 46). Applicant did not tell her about any fights he was in that were gang related. (WRR7: 46).

(252) Ms. Sovine's testimony and knowledge concerning Applicant's gang involvement was very limited with little foundation; therefore, the Court finds it is neither credible nor compelling.

(253) Concerning Applicant's drug use, Ms. Sovine testified Applicant began using marijuana when he was thirteen and PCP when he was fourteen. (WRR7: 31). She stated in her affidavit that he was smoking PCP daily by the time he

was in high school. (WRR7: 47). Ms. Sovine testified that Applicant ended up "smoking marijuana that was dipped in PCP, which is known as 'wet,' which is pretty—something pretty common with young people that are self-medicating an untreated mental health disorder." (WRR7: 31). Ms. Sovine testified that, because Applicant had both ADHD and a mental health diagnosis of significant depression with suicidal ideation, he had a "busy brain," which caused him to turn to marijuana and PCP to "calm and quiet . . . that constant disorder in the brain." (WRR7: 31- 32).

(254) Neuropsychologist Dr. McGarrahan, Applicant's trial expert, testified at the writ hearing that PCP is not a soothing drug; instead, it causes hallucinations. (WRR7: 119-120). She explained that a person would know PCP is not a soothing drug after using it for only a short period. (WRR7: 120). Clinical psychologist Dr. Reed testified at the writ hearing that the effects of PCP are not soothing, "[e]specially at higher doses, they trigger feelings of anxiety, panic, and agitation and restlessness." (WRR4: 20). Dr. Reed testified that PCP could cause hallucinations and paranoia. (WRR4: 20). Applicant's expert at trial, Dr. John Roache, a Ph.D. clinical pharmacologist, testified about the agitating and arousing effects of PCP, and explained it could cause psychotic effects including visual hallucinations and paranoia. (RR65: 128-144).

(255) Based on contrary testimony from the above three experts who have higher levels of clinical training than Ms. Sovine, the Court finds Ms. Sovine's opinion that Applicant was using PCP to "calm and quiet" his brain is not credible.

(256) Ms. Sovine testified she reviewed the trial testimony of Applicant's family members: Pamela Maddox, Ramon Maddox, Sr., Ramon Maddox, Jr., and Shamy Conley. (WRR7: 43; Application Exh. 5, at 31). However, Ms. Sovine did not review the trial testimony of Dr. Kessner and Dr. Roache. (WRR7: 43; Application Exh. 5, at 31).

(257) Dr. Kessner was present during the testimony of Applicant's family members and testified about the experiences and circumstances in Applicant's childhood that placed him at risk of committing criminal or violent acts in adulthood. (WRR4: 101-102; WRR8: 50-51). Moreover, Dr. Kessner had not interviewed Applicant and her testimony did not present any danger of opening the door to the State's expert testifying under *Lagrone*. (WRR4: 85-87; WRR7: 154-156; RR65: 154).

(258) Trial counsel elected not to use a social historian such as Ms. Sovine in furtherance of his punishment case. Trial counsel believed the family witnesses were good fact witnesses who could describe Applicant's upbringing and schooling first-hand. (WRR7: 158; WRR8: 44). This strategic decision fell within reasonable professional norms.

(259) There are disadvantages to using a social historian. Information that the social historian gathers and reviews will become known to the State at some point. As trial counsel explained, the State would have had access to Ms. Sovine's notes from her interview with Applicant under Rule 705 of the Texas Rules of Evidence. (WRR4: 102-103). Ms. Sovine's notes contained information that was unfavorable to the defense, including the following: Applicant began selling drugs at the age of sixteen; Applicant held up drug dealers at gunpoint for money to take care of his baby; Applicant had three children by the age of twenty-four and continued selling drugs and robbing for a living. (WRR4: 103; WRR State's Exh. 14). There was no evidence at trial that Applicant was a drug dealer as a teenager or adult, or that he robbed other drug dealers; and, nothing in the record indicates the State was aware of this information. (WRR4: 103).

(260) Additionally, Ms. Sovine's interview notes contain her conclusion that Applicant appeared to be suffering from symptoms of PTSD due to his actions in this capital murder, an opinion that would have likely alienated the jury by suggesting Applicant was himself a victim of his own crime. (WRR State's Exh. 14). As noted by trial counsel, while

some jurors could potentially have found this information to reflect remorse, other jurors could have found this information unfavorable. (WRR4: 104). Trial counsel testified, "I don't think a juror is going to reward any defendant for having PTSD for committing the crime that he committed." (WRR4: 104).

(261) Trial counsel also noted the trial team would have had to contend with hearsay and Sixth Amendment objections from the State if they had a social historian like Ms. Sovine testify about what Applicant and Applicant's family reported to her. (WRR4: 102).

(262) Moreover, trial counsel recognized that having a social historian testify who had interviewed Applicant would have opened the door to the State presenting the testimony of its expert, Dr. Reed, under *Lagrone*. (WRR4: 85-87, 102; WRR8: 46-47). Dr. Reed would have testified that Applicant was malingering, or exaggerating symptoms of mental illness, and met the diagnostic criteria for Antisocial Personality Disorder. (WRR State's Exh. 7). Accordingly, Dr. Reed's testimony would have been damaging to Applicant's punishment case.

(263) By opting not to present a social historian, trial counsel necessarily prevented the disclosure of additional aggravating information that the State could have used against him.

(264) In addition to the risks it posed, Ms. Sovine's testimony would have afforded little benefit to Applicant's punishment case. Ms. Sovine's testimony was not particularly compelling or credible. In short, although she did offer some explanation for how Applicant came to be the person who committed the capital murder of Carlos Gallardo, its mitigating value was questionable and it posed the risk of further harm to Applicant's defense.

(265) Applicant presents the testimony of Richard Burr in support of his contention that trial counsel was deficient by failing to present a social historian at trial. (WRR9: 106-

111).

(266) Mr. Burr testified that a number of studies have shown over the years that jurors do not understand and believe experts, particularly defense experts. (WRR9: 107). In his opinion, the lesson from those studies is not to discard experts, but to use social historians to bridge the gap between technical opinions and language and lay understanding. (WRR9: 107).

(267) Mr. Burr testified that professional standards reflect that a defendant needs a blend of testimony between lay and expert witnesses. (WRR9: 108). Applicant's punishment phase included a blend of lay and expert witnesses.

(268) Mr. Burr testified that the social historian would need to have access to the defendant, and he conceded that the social historian's notes or records would include information that is not helpful to the defendant's case, but he dismisses it as "rare" that a prosecutor will not know about these things. (WRR9: 109). He added that "very often, the bad things are explainable by what's happened in the client's life that he or she had no control over." (WRR9: 109).

(269) Mr. Burr did not testify that prevailing professional norms or the American Bar Association or Texas Bar Association guidelines require a trial team to use a social historian in every case; indeed, no such requirement exists. (WRR9: 106-111).

(270) The ABA guidelines do not require that a trial team use expert testimony to present a defendant's social history to the jury. They provide that "[e]xpert witnesses may be useful for this purpose and may assist the jury in understanding the significance of the observations." *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.11, Commentary (2003). The guidelines also state that counsel should use lay witnesses as much as possible to provide the factual foundation for the expert's conclusions. *Id.*

(271) A determination whether to retain a social historian to testify at trial is a strategy decision.

(272) Applicant fails to demonstrate by a preponderance of the evidence counsel was deficient for choosing not to present a social historian such as Ms. Sovine.

(273) Even assuming trial counsel's decision not to present a social historian was deficient, Applicant's defense suffered no prejudice from it.

(274) As set out above, the testimony Ms. Sovine would have proffered was not compelling mitigating evidence. Nothing about Ms. Sovine's testimony is of the type and quality of evidence that would have motivated the jury to alter its answers to one of the special issues.

(275) Further, her testimony created a risk of disclosure of additional aggravating evidence that would have been detrimental to Applicant's punishment defense. Her testimony further opened the door to aggravating evidence from the State through Dr. Reed. These circumstances would have counter balanced the benefit, if any, of Ms. Sovine's testimony.

(276) It is not reasonably likely the outcome of Applicant's trial would have been different even if counsel had presented the testimony of a social historian in the punishment phase.

(277) There is no substantial likelihood that presenting expert testimony from a social historian like Laura Sovine would have resulted in a different punishment verdict. *See Harrington v. Richter*, 562 U.S. at 111; *Strickland*, 466 U.S. at 696.

(278) Trial counsel's decision not to present a social historian did not prejudice Applicant's punishment case.

Trial Counsel Did Not Render Ineffective Assistance by Not Presenting the Testimony of a School-to-Prison-Pipeline Expert like Dr. Courtney Robinson during the Punishment Phase of Trial

(279) Applicant presented an affidavit and testimony of Dr. Courtney Robinson in this writ proceeding. (WRR5: 5-70; Application Exh. 3).

(280) Dr. Robinson has a Ph.D. in Cultural Studies and Education. (WRR5: 7). She is not a licensed psychologist. (WRR5: 7-8). She completed a dissertation and has developed expertise in the school-to-prison-pipeline phenomena, which applies to African American students. (WRR5: 9; Application Exh. 3, at 1). She runs a non-profit community organization devoted to combatting the school-to-prison pipeline phenomena through prevention, intervention, and advocacy. (WRR5: 13).

(281) Dr. Robinson has never testified before a jury, in a death penalty case, or even in a criminal case. (WRR5: 6, 38). She generally works in juvenile court, and she has no knowledge or expertise relating to the presentation of mitigation evidence in a death penalty case. (WRR5: 38). She was not available to testify in May 2012 in Applicant's trial, although other school- to-prison-pipeline experts would have been available. (WRR5: 38-39, 68).

(282) Dr. Robinson states in her affidavit that to form her opinions she reviewed educational, employment, medical, juvenile criminal, and adult criminal records; witness testimony from trial; and affidavits collected by Applicant's post-conviction counsel. (WRR5: 6-7; Application Exh. 3, at 2). A list of specific materials she reviewed, attached to her affidavit, however, lists no employment or medical records. (Application Exh. 3, at 16). Additionally, at one point in her testimony, Dr. Robinson stated that the only records she reviewed were school records. (WRR5: 19). Dr. Robinson did

not interview or conduct an evaluation of Applicant. (WRR5: 7, 69-70).

(283) Dr. Robinson explained that the "school-to-prison pipeline is a phenomena that we understand [that] through school discipline children end up in our criminal justice system." (WRR5: 10). She testified, "This process starts really, really early, as early as four years old. And what we see is that . . . African-American children are disproportionately disciplined in our schools." (WRR5: 10). This results in the children becoming disengaged in school and entangled in the criminal justice system. (WRR5: 11).

(284) Dr. Robinson testified that when a student acts out, a teacher has a choice to refer that student for services or discipline; she stated it is more likely educators will refer an African American student for discipline rather than services. (WRR5: 14-15).

(285) Dr. Robinson testified research shows that, in about the third grade, teachers begin to observe African American males as older and more aggressive than they are. (WRR5: 20-21). Dr. Robinson also testified African American children receive more out-of-school suspensions than in-school suspensions compared to their peers. (WRR5: 31).

(286) Dr. Robinson testified the school district did not provide Applicant with the services or treatment he needed at a young age. (WRR: 26-27). She stated there were moments Applicant was having a mental health crisis but school personnel disciplined him instead of providing services or treatment. (WRR5: 24). Dr. Robinson testified that if Applicant had received the services he needed at age six, "we wouldn't be sitting right here." (WRR5: 36).

(287) Based on indications in Applicant's school records that he had a desire to learn, Dr. Robinson concluded he had an organic brain problem. (WRR5:28-30). Her testimony,

however, failed to provide adequate support or explanation for this conclusion.

(288) Dr. Robinson's affidavit and testimony presents two primary theories about the school-to-prison-pipeline phenomena: that the school-to-prison-pipeline is a "system of misidentified [need for] special education and over use of school discipline." (Application Exh. 3, at 6). Dr. Robinson applies both theories to Applicant in her affidavit. She states that "research suggests that African American students are more often referred to special education for behavioral reasons rather than learning disability." (Application Exh. 3, at 7). After discussing how cultural biases affect the potential for greater special education and disciplinary referrals for African American boys, she states, "[Applicant's] experience of being assigned to special education mirrors the finding of this research," and he was assigned to a special education program in 1991 "because of behavioral issues." (WRR5: 39; Application Exh. 3, at 7-8). During her testimony at the writ hearing, Dr. Robinson initially indicated the school misidentified Applicant as a special education student. (WRR5: 39). She could not pinpoint, however, the source of the information in her affidavit that Applicant was placed in special education due to behavioral difficulties; and then, she seemed to contradict the conclusion in her affidavit by testifying, "I'm not suggesting he should not have been in special education." (WRR5: 41-43). The school records that exist do not identify the reason for Applicant's initial placement in special education. (WRR5: 43-44; *See* WRR Applicant's Exh. 8). Because Applicant's elementary school special education records do not exist, Dr. Robinson should have recognized that the reason for his referral to special education is unknown (with the exception of what family may recall), rather than seemingly working to fit Applicant into one of the theories she researches and supports. (*See* WRR Applicant's Exh. 8).

(289) Although Dr. Robinson asserts in her testimony and affidavit that the educational system failed to provide sufficient services and meet Applicant's needs, particularly at a young age, Dr. Robinson's testimony lacks credibility because Applicant's special education records for elementary and middle school are not available; therefore, it is not known what services he received. (WRR5: 19, 26-27, 44, 46-50; *see* WRR Applicant's Exh. 8).

(290) Dr. Robinson expressed an opinion that school officials improperly handled one situation where Applicant returned to Brandenburg Middle School—a school he was not attending at that time. (WRR5: 32-33). Dr. Robinson had not, however, reviewed any written reports or the trial testimony about the incident and admitted she did not know specifically what occurred. Because substantial material existed about the incident that she had not reviewed, this Court finds she lacked sufficient information to form an opinion about the incident, and finds Dr. Robinson's conclusion to be not credible. (WRR5: 32-33, 56; RR62: 27-38).

(291) Dr. Robinson testified that school authorities should treat a school fight as non-criminal behavior, but would warrant discipline. (WRR5: 53). She testified that a six or seven year old who brings razor blades to school and cuts his and another child's clothing, or even cuts another child, should receive discipline and treatment, without anyone labeling the behavior as a criminal act. (WRR5: 54-55). She agreed that possession of a knife with a six-inch blade by a high school student, drug possession, and selling drugs are criminal acts. (WRR5: 55). Accordingly, the jury could have concluded from her testimony that at least some behaviors Applicant engaged in as a youth warranted at least discipline in some instances, and was properly treated as criminal in other instances.

(292) Dr. Robinson testified that research shows school authorities disproportionately discipline African American children and special needs children in the school system, and she opined Applicant was over- disciplined beginning in kindergarten; yet, she did not identify a single, specific incident from Applicant's history where this occurred. (WRR: 10- 12, 14, 18, 21-22, 23-24, 36-37, 54).

(293) During her testimony, Dr. Robinson acknowledged that her affidavit contains a conclusion about Applicant's juvenile gang association that was identical verbatim to a statement in Ms. Sovine's affidavit:

> These gangs were not the violent adult street gangs of popular TV culture, but were more just groups of youth self-identifying as being in a gang to feel like they belonged to something and were with people that cared about them.

(WRR5: 57-58; Application Exh. 3, at 11). Dr. Robinson reviewed Ms. Sovine's affidavit to prepare her own affidavit. (Application Exh. 3, at 16). In response to being confronted with the fact that she and another expert included the same word-for-word conclusion, she commented, "We looked at it in the same way." (WRR5: 56-58). This highly unusual response indicates to the Court that Dr. Robinson copied this statement from Ms. Sovine's affidavit. This plagiaristic element of Dr. Robinson's work greatly reduces her credibility in this proceeding.

(294) Dr. Robinson indicated that Applicant's drug use, including his PCP use, was likely a way to self-medicate. (Application Exh. 3, at 15; WRR5: 51- 52). Dr. Robinson testified that any drug, including PCP, can be used to self- medicate. (WRR5: 52). Other experts in this proceeding reached contrary conclusions—that PCP, unlike some drugs, is not used to self-medicate. (WRR4: 20; WRR7: 119-120). The Court finds Dr. Robinson's opinion regarding PCP use to be not credible.

(295) Dr. Robinson's testimony and affidavit repeatedly reveal credibility problems that would not have presented well to a jury and would have negatively affected the overall value of her testimony.

(296) Counsel elected not to use a school-to-prison pipeline expert such as Dr. Courtney Robinson in furtherance of his punishment case. This strategic decision fell within reasonable professional norms.

(297) Applicant fails to rebut the presumption that his trial counsel acted consistent with reasonable trial strategy.

(298) The defense team believed the family witnesses were good fact witnesses who could describe Applicant's upbringing and schooling first-hand. (WRR7: 158). Based on information learned from jurors in individual voir dire, the team was wary of presenting what the jury might perceive as excuses for Applicant having committed the offense, including through use of an expert. (WRR7: 159). The attorneys tailored closing arguments to these concerns. (WRR7: 149, 159). Mr. Howard's testimony indicates the team utilized a strategy, in part, of presenting evidence of Roderick's upbringing through fact witnesses and contextualizing it in closing arguments. (WRR7: 149, 158-160).

(299) The selection of experts, if any, to explain Applicant's upbringing and history is a strategy decision.

(300) The trial attorneys presented two experts in punishment, Dr. Gilda Kessner and Dr. John Roache, who provided testimony to assist the jury in understanding portions of Applicant's life history. These experts, like Dr. Robinson, did not interview or evaluate him.

(301) After presenting facts of Applicant's upbringing through lay witnesses, trial counsel then presented the testimony of Dr. Gilda Kessner, a licensed psychologist, to point to experiences and circumstances in Applicant's childhood that

placed him at risk of committing criminal or violent acts in adulthood. (WRR4: 101-102; WRR8: 50-51; RR65: 155-162). Dr. Kessner did not interview Applicant. (RR65: 20, 154). She observed the testimony of Applicant's family members in the courtroom and testified about risk factors in a child's life and Applicant's life that correlated with the potential for violence in the future. (RR65: 155-162). Risk factors Dr. Kessner identified for Applicant included his ADHD, being born to a young mother with no parenting skills, being left as a young child to be cared for by other people, his mother not being affectionate, lacking a secure attachment to a primary caretaker, his biological father being incarcerated, only meeting his biological father at ages three and 11, and his mother's significant mental illness. (RR65: 155-162).

(302) Trial counsel also presented the testimony of John Roache, a Ph.D. pharmacologist, who specializes in clinical pharmacology, performs research on the causes and consequences of drug addiction, and has 30 years of clinical experience working with patients. (RR65: 119-122, 140). Dr. Roache reviewed Dallas County jail records reflecting that in December 2008, Applicant was in the Dallas County jail on a marijuana charge, and a jail physician diagnosed him with Cannabis Dependence, along with an indication to rule out Drug-induced Psychosis and Mood Disorder. (RR65: 137-138, 142-143). Other jail records reflected Applicant had a PCP dependence that included a history of daily PCP use. (RR65: 138-139, 144- 145).

(303) Dr. Roache testified at trial that early life risk factors can lead a person to begin using drugs, and repeated use and exposure causes the drugs to act biologically on the brain. (RR65: 124-126). Over time, drugs take control of the reward center of the brain (which is a motivational brain circuit) and other rewards and pleasures in life diminish in importance—life all becomes about drug involvement, seeking and procuring a supply, consuming and using drugs, and recovering from drug effects. (RR65: 124-125). This chronic drug condition affects the frontal lobes of the

brain, which involve conscious decision making and planning; ultimately, the drug user has less volitional control and exhibits more impulsive action. (RR65: 125-126). ADHD in early childhood involves the frontal lobes, and the inability to control oneself, by acting impulsively without thought and planning. (RR65: 126). Individuals already driven by impulse and urge, who lack thought and planning, are vulnerable to addiction, leading to a vicious cycle. (RR65: 126-127).

(304) Dr. Roache also testified at trial about the effects of chronic marijuana and PCP use. (RR65: 127-135). PCP, or phencyclidine, affects the neurochemical systems in the brain that are involved in motivational circuitry. (RR65: 128). PCP has both sedative and stimulant properties, which is very unsettling for most people. (RR65: 129-130). It simultaneously causes a dissociative state where nothing matters (dulling sensations and relaxing a person), while at the same time also agitating and arousing him. (RR65: 130). PCP additionally has a euphoria affect and creates a sense of empowerment, invincibility, and invulnerability. (RR65: 130). PCP can create visual hallucinations and psychotic effects, including paranoia and persecutory delusions. (RR65: 130-133). PCP can in addition rarely cause extreme violence. (RR65: 133-134). Some people are particularly vulnerable to PCP-induced psychosis involving paranoia and violence, and experts do not know why, although bipolar mania and schizophrenia produce risks for PCP-induced mania or psychosis. (RR65: 133-134, 144). Engaging in extreme violence under the influence of PCP, though rare, tends to be associated with individuals who have underlying vulnerabilities, like bipolar and schizophrenia, in their personal or family history. (RR65: 135, 143-144). Dr. Roache testified that once a person is in a setting without PCP, the person would become more clear, more coherent, and more in control. (RR65: 140).

(305) From Dr. Roache's testimony, the jury could have concluded that: Applicant's early childhood ADHD was a

risk factor for drug addiction; drug addiction is based on chemical processes in the brain, which Applicant could not control; and Applicant's drug addiction spurred poor decision making and impulsive acts. The jury could have concluded Applicant's criminal behavior followed from his drug use—to obtain funds to support a daily PCP habit—and that the dissociative state and euphoria caused by PCP impacted his judgment. The jury could have concluded Applicant was vulnerable to PCP-induced psychosis and violence, based on his own and his mother's significant mental illness, which could explain some of the violent acts they heard evidence about in the punishment phase.

(306) One of the themes the defense team implemented in the punishment phase of trial was that Applicant's most violent behavior occurred as a result of his PCP use, and because he was incarcerated, no longer on PCP, and would not have access to PCP in prison, he would not be a future danger. (WRR8: 39, 41-43).

(307) The Court finds Dr. Roache's trial testimony encompasses information the jury could have applied to both special issues. (*See* WRR8: 42).

(308) Applicant does not prove by a preponderance of the evidence counsel that was deficient for choosing not to present the testimony of a school-to-prison- pipeline expert such as Dr. Robinson.

(309) Even assuming counsel's decision not to present a school-to-prison-pipeline expert were deficient, Applicant's defense suffered no prejudice from it.

(310) The testimony Dr. Robinson proffered was not compelling mitigating evidence. She frequently failed to tie her primarily didactic testimony regarding the school-to-prison-pipeline phenomena to specific instances in Applicant's life. Some of her testimony was contradictory and lacked support. She appeared to have copied a conclusion from another expert's report, which negated her credibility. Having never testified

in a criminal case or before a jury, she did not seem prepared to withstand the cross- examination expected in a contested criminal proceeding.

(311) The extent of Applicant's criminal activity, including an extraneous capital murder and multiple robberies of innocent victims in their homes in the weeks prior to the case-in-chief capital murder, constituted strong and persuasive evidence in the punishment phase.

(312) It is not reasonably likely the outcome of Applicant's trial would have been different even if counsel had presented the testimony of a school-to-prison- pipeline expert.

(313) Dr. Robinson did not discover any significant aspect of Applicant's school experience of which trial counsel were unaware.

(314) There is no substantial likelihood that presenting expert testimony from a school-to-prison-pipeline expert like Dr. Courtney Robinson would have resulted in a different punishment verdict. *See Harrington v. Richter*, 562 U.S. at 111; *Strickland,* 466 U.S. at 696.

(315) Counsel's decision not to present a school-to-prison-pipeline expert did not prejudice Applicant's punishment case.

Trial Counsel Did Not Render Ineffective Assistance by Not Presenting the Testimony of a Gang Expert to Contextualize Applicant's Gang Membership as Mitigating

(316) The Court incorporates its findings of fact and conclusions of law for Ground 2 below into its findings and conclusions for this claim; both allege trial counsel rendered ineffective assistance for failing to present a gang expert in his defense.

(317) Applicant has not proven counsel was deficient for not calling a gang expert to testify at trial in order to contextualize Applicant's gang membership as mitigating.

(318) Applicant fails to prove that not presenting the testimony of a gang expert to contextualize Applicant's gang membership as mitigating prejudiced his defense.

(319) Applicant has not proven counsel rendered ineffective assistance by not calling a gang expert to testify in his case in the punishment phase.

Conclusions – Ground 1

(320) Applicant has failed to prove by a preponderance of the evidence that: trial counsel rendered ineffective assistance by not sufficiently investigating and presenting evidence during the punishment phase of trial that he suffers from a fetal alcohol spectrum disorder and was exposed to toxic levels of lead as a child; trial counsel rendered ineffective assistance by not presenting the testimony of a social historian or a school-to-prison-pipeline expert during the punishment phase of trial; and trial counsel rendered ineffective assistance by not presenting a gang expert to contextualize Applicant's gang membership as mitigating.

(321) Applicant's claims in Ground 1 are without merit. The Court recommends that Ground 1 be denied.

GROUND 2 Gang-Related Evidence

In Ground Two, Applicant contends trial counsel rendered ineffective assistance during the punishment phase of trial for not offering the testimony of his own gang expert to rebut the State's gang expert and to rebut evidence of Applicant's association with a West Dallas street gang. (Application at 70-75).

The Court incorporates into the below findings on Ground 2 its findings of fact and conclusions of law related to Applicant's allegations in Ground 1 that trial counsel rendered ineffective assistance by not presenting the testimony of a gang expert to contextualize Applicant's gang membership as mitigating.

(322) Prior to trial, Applicant requested a Rule 705 hearing to challenge the admissibility of the expert testimony of Detective Barrett Nelson, a Dallas police officer who was previously assigned to the Dallas Gang Unit. (WRR8: 18-19; RR62: 43). The Court conducted the hearing on May 11, 2012, pursuant to *Menno v.* State, 970 S.W.2d 549 (Tex. Crim. App. 1998). (RR61: 5-40). Applicant's counsel challenged the admissibility of Detective Nelson's testimony because there was no evidence of a direct connection between Applicant and any actions by the Fish Trap Bloods (or any other Bloods). (RR61: 34). Trial counsel urged the evidence violated Applicant's rights under the First and Fourteenth Amendments, was inadmissible as improper character evidence, was not relevant, and was more prejudicial than probative under Texas Rules of Evidence 401, 402, and 403. (RR61: 34-35). The Court overruled Applicant's objections. (RR61: 35-36).

(323) An investigator with the Dallas County District Attorney's office took photos of Applicant's tattoos approximately three weeks prior to trial. (WRR8: 18; RR62: 40-42; SE 150-163).

(324) Detective Nelson testified that Applicant's tattoos indicate he is a member of the Fish Trap Bloods, a criminal street gang in Dallas. (RR62: 51-53, 64;SE 159-160). This street gang is named after the former Fish Trap projects on Fish Trap Street in West Dallas. (RR62: 50-51).

(325) Particularly, Applicant has tattoos of "Fish Trap," "West," "212," and "3500." (RR62: 50-52; SE 158-159). Barrett testified the number 212 is associated with West Dallas, which has the zip code 75212, and is associated with the Fish

Trap Bloods. (RR62: 51). The number 3500 represents the 3500 block in front of the former Fish Trap projects. (RR62: 52; SE 162). Barrett testified Applicant's star tattoos also mean he is associated with the Bloods. (RR62: 51).

(326) Applicant also has tattoos of "STR8" "HOOD," meaning "straight hood," and "HUSTLA." (RR62: 46-49; SE 152-156). Barrett testified that "straight hood" means Applicant comes from the hood, or street, and will handle his business in a hood-type manner. (RR62: 46-47). Barrett testified "HUSTLA," means "hustler" and indicates Applicant is hustling for his money—in life and to get ahead—and includes selling narcotics. (RR62: 48-49).

(327) Applicant's left forearm also has a tattoo of "Piru," which is the street in Los Angeles where the Bloods were founded. (RR62: 53; SE 163). According to Detective Barrett, the tattoo of "CK," means "Crip killer," again indicating Applicant is a Blood member; in West Dallas, the rival gang to the Fish Trap Bloods are the Rupert Circle Crips. (RR62: 53).

(328) On cross-examination, Nelson explained that the Fish Trap Bloods are not an organized gang with a leader, an organizational hierarchy, or a meeting place. (RR62: 65-68). His testimony included that the Fish Trap Bloods do not engage in criminal activity as a group. (RR62: 65-66). He indicated Applicant is not identified as a gang member in the DPD Gang Unit's files. (RR62: 68-69). Mr. Parks suggested during cross-examination that the "CK" tattoo Detective Nelson identified was actually "CO." (RR62:68). Regardless, Detective Barrett testified there is no evidence Applicant had ever killed a Crip. (RR62: 68).

(329) Mr. Parks testified at the writ hearing that he believes the defense got what they needed from Detective Nelson on cross-examination. (WRR8: 25). When the witness left the stand, the jury knew Applicant was in a juvenile gang that was generally identified by the neighborhood where they lived— and that neighborhood no longer exists because the

Fish Trap projects had been torn down. (WRR8: 25). Applicant's tattoos also indicate the gang was associated with a particular neighborhood. (WRR8: 25). Mr. Parks recalled that Detective Nelson's testimony indicated he knew of no crime Applicant committed while he was in the juvenile gang; and, importantly, Detective Nelson testified Applicant's name was not among those identified by the Dallas Police Department as a gang member. (WRR8: 26). Prior to the testimony, trial counsel believed that if Detective Nelson testified truthfully, they would get all of this information from him—and they did. (WRR8: 26).

(330) Trial counsel sought and the Court granted a limiting instruction on Detective Nelson's testimony and the gang-related evidence. (WRR8: 19- 20; RR62: 56-57, 60-62, 70-71). The Court gave the limiting instruction orally at the conclusion of Detective Nelson's testimony and included a written instruction in the punishment charge. (WRR8: 20; RR61: 70-71; CR: 682).

(331) Applicant reported to his expert, Dr. McGarrahan, that he began his involvement in a gang at around age 13 or 14 and left the gang at age 19 or 20. (WRR7: 126).

(332) Applicant alleges a defense gang expert could have informed the jurors Applicant was only a former member of a juvenile gang and that certain sociological, environmental, and developmental factors led to Applicant's gang affiliation. (Application, at 70).

(333) With his application, Applicant filed the affidavit of Charles Rotramel in support of his claim that trial counsel should have presented a gang expert to turn the aggravating aspect of Applicant's gang membership into mitigating evidence and to challenge the meaning of Applicant's gang affiliation. (Application, at 44, 56-58, 68-69, 70-75; Application Exh. 4).

(334) Charles Rotramel did not testify at the writ hearing. (WRR2: 116). The State moved to strike Mr. Rotramel's affidavit on the basis he was not appearing to testify and Applicant was replacing him with a different gang expert. (WRR2: 116; WRR6: 7-8; WRR7: 6-9). The Court denied the State's request to strike the affidavit but ruled the Court would not consider it for any purpose except to the extent another expert in the proceeding relied upon it. (WRR2: 116-118; WRR7: 6-9).

(335) Dr. Robinson testified briefly during her direct-examination in the writ hearing regarding gang issues. (WRR 5: 34-36). She testified that her work with school systems intersects with the study of gang behavior and gang membership. (WRR 5: 34). She opined that the schools assign children with a gang affiliation without the child actually participating in an actual gang; she takes a role in educating teachers about this phenomena by advocating that children who have known each other their whole lives, who hang out together, and who may get in fights together, are not a gang. (WRR 5: 34- 36). She explained that when the school system attaches a gang label to a referral, this in turn affects the child's treatment in the court system. (WRR 5: 34-35).

(336) Applicant has not alleged in this proceeding that the schools identified him as a gang member. There is no evidence his schools identified him as a gang member. Dr. Robinson did not testify Applicant's schools misidentified him as a gang member—merely that the phenomena exists. Dr. Robinson's testimony regarding school systems who misidentify students as gang members is irrelevant to this proceeding.

(337) Dr. Robinson recalled reading in the materials she reviewed in this case that Applicant's gang membership was "just a group of people that he connected with and cared about." (WRR 5: 36). She testified she did not read anything about true gang activity. (WRR 5: 36).

(338) When asked about Applicant's teenage gang membership, Dr. Robinson's testimony included "I do remember reading about it . . ." and "this other person [referring to an expert in this proceeding] suggested that the gang involvement was not unusual for youth in the neighborhoods where [Applicant] grew up." (WRR5: 57). Based on her testimony and affidavit, Dr. Robinson appears to have adopted her opinions specific to Applicant and gang issues entirely from Ms. Sovine's or Mr. Rotramel's work. (WRR5: 56-58; Application Exh. 3, at 11; *See* Application Exh. 4-5).

(339) Dr. Robinson did not review Dr. Hagedorn's affidavit. Dr. Hagedorn completed his affidavit after Dr. Robinson testified.

(340) The Court finds Dr. Robinson's testimony regarding gang issues in its entirety to be irrelevant or not credible. Although her research on the school- to-prison pipeline phenomena has centered on the Dallas area, she does not have any specialized knowledge regarding Dallas juvenile street gangs or the Fish Trap Bloods street gang.

(341) Ms. Sovine's testimony, too, indicates she primarily received her information about Applicant's gang association from her review of Mr. Rotramel's affidavit. (WRR7: 30). Describing the "information in the record related to [Applicant's] involvement in any sort of gang activity," she testified:

> There was like a youth gang that he was apparently jumped into that was - - my understanding was sort of a neighborhood gang of friends, like sort of identified as being from a particular area. That was kind of a way that they grouped up and the way that they found protection and kind of alliance with each other.
>
> (WRR7: 30).

(342) Ms. Sovine did not review Dr. Hagedorn's affidavit.

(343) Ms. Sovine admitted she has no familiarity with the Fish Trap Bloods. (WRR7: 45).

(344) Applicant told Ms. Sovine during her interview with him that he was initiated into the gang—by being "jumped in"—at age 8. (WRR7: 45; RR State's Exh. 14).

(345) Ms. Sovine's limited testimony and knowledge about Applicant's gang membership and the Fish Trap Bloods does not support Applicant's contention his trial counsel were ineffective for failing to present a gang expert to contextualize his gang membership as mitigating.

(346) At the writ hearing, Mr. Burr explained his opinions about prevailing professional norms for investigating gang-related evidence. (WRR9: 112- 114). Applicant has no allegation in his writ, however, that trial counsel was ineffective for failing to conduct an investigation related to gang evidence.

(347) Mr. Burr testified that, if a defendant acquires gang tattoos after an arrest while he is awaiting trial, it could mean he was not involved or was only minimally involved in gang activity prior to his arrest and that his gang activity likely had nothing to do with his offense. (WRR9: 114-115). Mr. Burr opined that if a defendant acquires gang tattoos while he is in jail, it may reflect he is a vulnerable inmate who is trying to protect himself by aligning with a gang, because he is scared. (WRR9: 115).

(348) Based on all of the gang-related evidence in this proceeding, this Court does not find Mr. Burr's opinions regarding the gang issues to be persuasive.

(349) On September 19, 2019, Applicant filed the affidavit of Dr. John M. Hagedorn, along with Exhibits A through O attached to the affidavit, in support of his claims that trial counsel should have used a gang expert to rebut the State's gang expert and to contextualize Applicant's gang membership as mitigating.

(350) Dr. Hagedorn explains in his affidavit that society and the criminal justice system have a prejudice against gang association which is often rooted in misleading stereotypes. (Hagedorn Affidavit, at 2-5). He further explains that juvenile gang membership is transitory—or of a short duration—for most youth, and is not a permanent identity. (Hagedorn Affidavit, at 5-6). Further, he opined youth gang membership is not a predictor of long-term gang affiliation. (Hagedorn Affidavit, at 7).

(351) Dr. Hagedorn indicated in his affidavit that a gang is "a unit of individuals with traditions, solidarity, and attachment to local territory," and membership is "a means for an individual to assert his or her identity as a member of a neighborhood community" and "a source of self-identity and stability," but is not a "reliable indicator of the type of adult a young person will become." (Hagedorn Affidavit, at 5-7).

(352) Dr. Hagedorn's opinion that youth gang membership does not reliably indicate the type of adult a person will become stands in contrast to the facts here—that Applicant was a member of a juvenile gang and, regardless of whether that gang membership extended into his adulthood, Applicant committed multiple violent robberies, shootings, and murders as an adult, and then exhibited a demeanor and attitude reflecting little or no remorse or empathy for his victims.

(353) Dr. Hagedorn did not conduct an interview of Applicant. He did not meet with him and ask him about his gang affiliation. Dr. Hagedorn's affidavit does not reflect he has specialized knowledge of Dallas juvenile street gangs or conducted any research on the Fish Trap Bloods. In response to Dr. Hagedorn's Affidavit, the State filed the Affidavit of Assistant District Attorney Justin Lord. Mr. Lord was the attorney at trial who handled the direct examination of Detective Nelson.

(354) Mr. Lord stated in his affidavit that based on his research relating to Dr. Hagedorn and his work, if Applicant had called Dr. Hagedorn at trial, Mr. Lord's cross-examination would have included the following topics: whether Dr. Hagedorn was aware that after Applicant committed this capital murder on March 17, 2009, an officer in the emergency room with him noticed he was wearing one red glove (RR59: 150-153; SE 115), whether wearing red gloves might indicate a continuing desire to be associated with the Bloods, and whether this evidence might influence Dr. Hagedorn's opinion about Applicant's gang affiliation at the time of the offense; whether Dr. Hagedorn was aware that Applicant committed an extraneous aggravated robbery of Luis Gonzalez on February 15, 2009 and that Applicant and a second robber each wore one red glove and one white glove during that offense (RR62: 230, 243; SE 176); whether—even if it were true that Applicant only acquired his tattoos while awaiting trial—this might indicate Applicant was either a gang member at the time of trial or had a continuing desire to be associated with a gang; that Dr. Hagedorn's gang research primarily has been conducted in Chicago and Milwaukee; that Dr. Hagedorn has not conducted research or published materials relating to Dallas area gangs or the Fish Trap Bloods; that the Bloods, whether referring to a juvenile or adult gang, is one of the two most well-known gangs; and that juvenile street gang members—not just adult gang members—commit crimes and engage in violence, including robbery, murder, sex assault, and selling drugs. (Lord Affidavit, at 3-4).

(355) By examining two photos and an "AIS report" listing identifying information, Dr. Hagedorn concluded Applicant appeared not to have his gang-related tattoos when he committed the capital murder of Carlos Gallardo. (Hagedorn Affidavit, at 9-10, 14; Exh. B, C). On this basis, he alleges Detective Nelson's testimony misled the jury about Applicant's status as a gang member. (Hagedorn Affidavit, at 10).

(356) Dr. Hagedorn attaches two photographs to his affidavit, one depicting Applicant in a hospital bed and the other of Applicant holding a child; both show an exposed left forearm. (Hagedorn Affidavit, at 9). Dr. Hagedorn also relies on a photo of a Dallas County Adult Information System profile for Applicant with the "scars/marks/tattoos/piercings/ amputations" section of the form left blank. (Hagedorn Affidavit, at 9).

(357) The Court finds it is difficult to ascertain, due to the quality of the photos, what tattoos Applicant had when the photos were taken. Some writing on his left forearm is evident in at least one photo—but is unclear what it is. The date of the photo of Applicant holding the child is unknown.

(358) Regardless, there is evidence contrary to Dr. Hagedorn's theory that Applicant had no tattoos associated with the Fish Trap Bloods at the time of this capital murder and that he only acquired his gang-related tattoos while incarcerated and awaiting trial.

(359) Mr. Lord attached various records to his affidavit that refute a theory Applicant acquired his tattoos while incarcerated prior to trial. If Applicant had proffered this theory at trial, the State could have offered the following evidence in rebuttal:

> A Garland Police Department Incident/Investigation Report for the May 9, 2003 burglary of a building which indicates Applicant had the tattoo "Dallas" on his right forearm, "Piru, tx" on his right upper arm, "Texas" and "3500" on his left forearm, and "West Dallas" on his left upper arm.
>
> A Garland Police Department Arrest Report for the December 23, 2003 arrest of Applicant for the offense of burglary of a building and unauthorized use of a motor vehicle which indicates Applicant had the tattoo "Dallas" on his right forearm, and

"Piru, tx" on his right upper arm.

A DPD Arrest Report for the April 19, 2007 arrest of Applicant for the offense of unauthorized use of a motor vehicle which indicates Applicant had the tattoo of "West Dallas" on his left arm.

A DPD Arrest Report for the December 27, 2008 arrest of Applicant for the offense of possession of marijuana which indicates Applicant had tattoos on both arms.

A Dallas Adult Information System Identification Information page printed April 8, 2009 which indicates Applicant had tattoos on his right shoulder, right forearm, left shoulder, and left forearm.

A Justice Exchange Person Summary report printed April 8, 2009 which indicates Applicant had tattoos on his upper left arm, left forearm, right forearm, and right shoulder.

(360) The Court finds this evidence indicates Applicant had some tattoos related to a gang affiliation (primarily "Piru" and "3500") as early as 2003.

(361) The Court finds it is unclear when Applicant acquired many of the tattoos that were the subject of Detective Nelson's testimony.

(362) Even if the jury believed Applicant acquired some of his gang-related tattoos while awaiting trial, evidence he had at least some other gang-related tattoos, including "Piru," "3500," and "West Dallas" as early as 2003, negates Hagedorn's theory.

(363) Dr. Hagedorn reviewed over 500 pages of Applicant's Dallas County Juvenile Department criminal and probation records and concluded the records repeatedly reflect either

that Applicant was not a gang member or that Applicant and his parents did not report any gang affiliation for Applicant, with a single exception of one indication of gang affiliation (specifically that Applicant hung out with the Fish Trap Bloods). (Hagedorn Affidavit, at 10-13).

(364) Dr. Hagedorn reviewed Applicant's criminal records from the Dallas Police Department (DPD) (which Applicant's writ counsel obtained by subpoena during this writ proceeding) and noted those records do not mention any involvement in a gang or reflect that Applicant's offenses were gang-related. (Hagedorn Affidavit, at 13).

(365) Dr. Hagedorn concluded the Dallas County Juvenile Department and DPD records do not support a conclusion Applicant was a gang member at the time of the capital murder of Carlos Gallardo. (Hagedorn Affidavit, at 14).

(366) Dr. Hagedorn concluded that, if Applicant had an association with a gang as a youth (as he reported one time in the juvenile records in 2000), that association was likely a loose and transitory affiliation. (Hagedorn Affidavit, at 14).

(367) Based on the records, it appears that to form his opinions Dr. Hagedorn reviewed all DPD offense reports associated with Applicant's name. Although the jury heard evidence in the punishment phase about a number of extraneous offenses, there was no evidence at trial about the following four offenses that were included in those DPD records: (1) 04/25/2006 Assault of Pamela Reese, the mother of Applicant's children; (2) 05/25/2007 Aggravated Assault (shooting) of Reginald Stanley; (3) 08/18/2008 Aggravated Assault (shooting) of Rodrigo Martinez; and (4) 03/14/2009 Aggravated Robbery of Wilbur Morgan.

(368) An expert's review of information to form an opinion opens the door to that information being admitted into evidence before the jury. Evidence Applicant was involved in four additional, alleged extraneous offenses would have been

detrimental to Applicant's case.

(369) Dr. Hagedorn noted that school and juvenile records regularly describe Applicant as a loner, which is uncommon for a gang-involved youth. (Hagedorn Affidavit, at 13-14). He expressed an opinion Applicant must not have been "an involved gang member" because his juvenile and school records reflect he mostly kept to himself, had few friends, and had significant difficulties in interpersonal relationships. (Hagedorn Affidavit, at 14-15).

(370) Evidence that Applicant participated in numerous cliques with other Dallas County jail inmates, however, strongly refutes evidence Applicant would not participate in a gang because he was a loner. Also, Dr. Hagedorn's hypothesis is strongly refuted by evidence admitted at trial related to the Luis Gonzalez extraneous robbery and Roberto Ramos capital murder, which Applicant committed with other assailants. If Dr. Hagedorn or a similar expert had expressed an opinion to the jury that Applicant was likely not an involved gang member because he had a tendency to be a loner, the State likely would have refuted that opinion in closing arguments with these obvious, contradictory facts.

(371) Dr. Hagedorn believes Applicant may have acquired his gang-related tattoos while incarcerated and awaiting trial. (Hagedorn Affidavit, at 14-15).

(372) Dr. Hagedorn concluded that if Applicant acquired his gang-related tattoos while awaiting trial, "it is highly likely that he did so as a matter of survival in prison." (Although Dr. Hagedorn refers to "prison," Applicant was detained in the Dallas County jail, not prison, prior to trial.) Dr. Hagedorn continues, "This would be consistent with [gang] research that inmates join gangs during their incarceration as a means of protection and security in a dangerous environment." (Hagedorn Affidavit, at 15).

(373) An expert's opinion that Applicant acquired his gang-related tattoos while awaiting trial would have done far more harm than good to his punishment case. (*See* Hagedorn Affidavit, at 9-10, 13-15).

(374) Mr. Parks testified the trial team would not have proffered a theory or evidence that Applicant acquired his gang-related tattoos after the offense and while he was incarcerated in the Dallas County jail awaiting trial because this theory would "torpedo our suggestion to the jury at least that his gang days were long over after he left the juvenile gang." (WRR8: 35). Applicant's brother had testified Applicant entered the gang at age ten. Evidence Applicant acquired gang tattoos shortly before trial would convey to the jury that Applicant was in a gang from age ten until the time of trial. (*See* WRR8: 35).

(375) Evidence Applicant acquired gang-related tattoos while incarcerated prior to trial could have led the jury to believe Applicant was a current, active gang member.

(376) If trial counsel had presented a theory that Applicant acquired gang-related tattoos while awaiting trial, the jury could have concluded this was clear evidence of Applicant's continuing intent to be associated with a gang, which supported a "yes" answer to the future-danger special issue.

(377) Dr. Hagedorn's suggestion Applicant may have acquired his tattoos as a means of self-protection while awaiting trial tends to portray Applicant as a person who was at risk of being victimized while in jail. This would have invited the State to offer additional, more detailed rebuttal evidence of Applicant's bad acts in the Dallas County jail and would have been incredibly harmful to Applicant's case.

(378) At trial, the State introduced rebuttal evidence through Sergeant Curfey Henderson, commander of the Dallas Sheriff's Office's Special Response Team division, that Applicant had disciplinary problems with fellow inmates in

the Dallas County jail due to "running" his tank, bullying other inmates, and attempting to use other inmates' commissary accounts. (RR65: 268, 270-278, 282-283). These incidents resulted in Applicant repeatedly being moved to new housing locations within the jail. (RR65: 270-274, 282-283). Sergeant Henderson further testified Applicant is very clever and used his size to intimidate other inmates. (RR65: 275-276). He explained that Applicant formed cliques with other inmates in order to "run" a tank. (RR65: 276).

(379) Sergeant Henderson's testimony conflicts directly with Dr. Hagedorn's theory that Applicant needed to acquire tattoos in order to protect himself while incarcerated.

(380) The State utilized only two Sheriff's Office employees to testify generally about Applicant's inappropriate behavior while in the Dallas County jail. Mr. Lord attached a number of jail incident reports to his Affidavit containing details of numerous incidents involving Applicant in the jail. (Lord Affidavit, Exh. C). If Dr. Hagedorn or a similar witness had testified in Applicant's punishment case, the State likely would have called additional rebuttal witnesses (jailers and/or inmates) who were directly involved and would have testified about the following incidents in which Applicant was often reported to be a bully and aggressor:

> On October 14, 2009, an inmate in Tank 4E04 gave a detention officer a kite [i.e. note] stating that Applicant was causing problems in the tank. As a result, jail authorities transferred Applicant to another housing location.
>
> On February 20, 2010, an inmate reported Applicant and two other inmates were causing problems by harassing him and others. The inmate reported Applicant and his two cohorts threatened the inmates who had television privileges. Additional inmates confirmed Applicant and two others were bullying the occupants of the tank. Applicant and

the two inmates were transferred to new housing locations as a result.

On March 25, 2010, an inmate in Tank 7W09 reported that Applicant and another inmate had stolen his commissary. Officers investigated. Several other inmates confirmed the first inmate's report. Officers learned that inmates in Tank 7W10 had been picking the lock and entering Tank 7W09. Applicant and the other inmate were transferred to a new housing location.

On April 27, 2010, three inmates including Applicant were observed to be boxing (horse-playing) in the dayroom. Officers had previously addressed the inmates' disruptive behavior in the tank and toward officers. Officers were aware the three inmates had formed a clique and were running the tank. Officers moved Applicant and the other two inmates to new housing locations and instituted procedures to keep Applicant and the two inmates separate from one another in the future.

On June 21, 2010, an inmate in Tank 6W07 gave a kite to an officer with a written note indicating Applicant was causing problems in the tank with other inmates and taking their food. Several inmates had signed the kite. Applicant was transferred to administrative custody.

On January 11, 2011, an inmate reported he was being threatened by Applicant and another inmate in Tank 2W02. Officers spoke to other inmates in the tank and learned Applicant was "trying to control the tank." Officers transferred Applicant to another location and instituted procedures to keep Applicant separate in the future from all other inmates housed in that tank.

On March 21, 2011, several inmates in Tank 5W06 reported Applicant was bullying them and they were afraid of him. They reported that several of them had to purchase commissary items for him the prior week; he threatened that if they told anyone he would "handle them." Officers confirmed the report with several individuals. As a result, officers transferred Applicant to another housing location.
On April 6, 2011, an inmate reported that he was fearful of Applicant and two other inmates in Tank 4E08 who were threatening him if he did not buy them commissary items. Applicant and the two other inmates were transferred for running a clique in the tank, and the reporting inmate was separated for his safety.

On May 2, 2011, a jail employee observed Applicant collecting another inmate's commissary items. Applicant reported that he was on commissary restriction but that a family member had contributed money to the other inmate's account. As a result, Applicant was transferred to administrative custody.

On August 31, 2011, officers observed two inmates in a verbal confrontation. After investigation, officers concluded Applicant was "trying to run the tank." Applicant was transferred in order to reduce problems in the tank.

On September 30, 2011, several inmates reported Applicant was causing problems in Tank 3E06 by "running" the television. Applicant was transferred to another location.

On April 14, 2012, an inmate in Tank 5W05 told an officer the inmates in the tank were "living in fear of" Applicant. The inmate gave the officer a kite explaining that Applicant was using his size to get

> what he wanted, had been very physically and verbally aggressive, and controlled the television. Upon investigation, another inmate in the same tank indicated Applicant caused racial tension, the other inmates were "fed up" with Applicant, and physical altercations might result. Officers moved Applicant to a new housing location as a result.

(Lord Affidavit, Exhibit C).

(381) Additional evidence that Applicant was known for forming cliques in the Dallas County jail, running his tank, bullying other inmates, and using other inmates' commissary funds, would have demonstrated to the jury Applicant would be an aggressor in prison rather than a victim.

(382) There is no evidence in this writ proceeding consistent with Dr. Hagedorn's theory that Applicant may have been a vulnerable inmate. The evidence, in fact, reflected quite the opposite.

(383) An expert theory that is so contrary to evidence already before the jury and which would invite additional evidence harmful to Applicant would not have been favorable to Applicant in any way and would have invited distrust of Applicant's case by the jury.

(384) Dr. Hagedorn opines in his affidavit that Detective Nelson's testimony misled the jury due to "the fact that the tattoos at issue do not appear to accurately reflect Mr. Harris's gang affiliation at the time of the crime." (Hagedorn Affidavit, at 10).

(385) Applicant's gang affiliation at the time of the offense was not a primary issue at trial. There were no specific allegations that the case-in-chief robbery and capital murder was a gang-motivated offense. The victims had no association with gangs. The evidence indicated Applicant committed

robberies as his way of making a living, as opposed to furthering some gang agenda.

(386) Although it was not the focus of the State's case, there was some collateral evidence at trial Applicant had a continuing association with a gang as an adult—by wearing a red glove during the capital murder, by his handwritten drawings made during the voir dire proceedings (SX 164), by the fact he carried red items at the time of the offense (red cell phone and red key chain) (RR59: 154-155 SX 116), and by wearing one red glove and one white glove during an extraneous robbery shortly before the capital murder. Ramon Maddox, Sr., also seemed to indicate he heard Applicant was in the Bloods, although the timing of that association was unclear.

(387) Having a testifying expert review all of Applicant's juvenile and adult criminal records and rely on them to form an opinion would have opened the door for all of this information to be admitted into evidence. (*See* WRR8: 33). No competent counsel would purposefully undertake such a strategy. Particularly, the adult criminal records included a case in which Applicant was a suspect in a non-charged aggravated assault for the May 25, 2007 shooting of Reginald Stanley, who suffered four gunshot wounds and was rendered a paraplegic. (Lord Affidavit, Exh. A).[10]

(388) Immediately prior to trial, the State gave Applicant notice of intent to introduce this aggravated assault, or attempted capital murder, as an extraneous offense in the punishment phase. (RR54: 4-16). Applicant's trial team objected to insufficient notice and succeeded in keeping this case out of evidence. The Court warned Applicant, however, that if the defense team opened the door, the case could

[10] Mr. Lord stated in a footnote in his affidavit that the State provided the offense report to Applicant's trial counsel prior to trial. (Lord Affidavit, at 6). (RR54: 7-8, 12-14). In this writ proceeding, Applicant originally filed un-redacted DPD records with Dr. Hagedorn's affidavit. (WRR8: 5-9). The State asked the Court to require Applicant to redact confidential information in the records; Applicant agreed. (WRR8: 5-9). In the amended filing of Dr. Hagedorn's affidavit, Applicant redacted the report for the May 25, 2007 shooting of Reginald Stanley in its entirety

come in as rebuttal evidence. (RR54: 16). Having an expert testify who reviewed those records would have been directly contrary to the Court's warning and to the trial team's efforts to keep that information from being admitted into evidence.

(389) Evidence of this May 2007 shooting would have provided evidence at trial that Applicant had shot and nearly killed a man almost two years prior to the February/March 2009 robberies and shootings, thus indicating Applicant's history of extreme violence was quite lengthy.

(390) Placing documentation of Applicant's entire juvenile and adult criminal history before the jury, including every Dallas Police Department offense and prosecution report associated with Applicant's name, would have been profoundly detrimental to his case.

(391) The defense team's credibility with the jury would have been substantially diminished if they called a gang-expert to testify to an opinion that Applicant was not in fact a gang member because DPD records did not mention a gang association and juvenile records only mentioned a gang association once.

(392) Dr. Hagedorn's proffered testimony, as set out in his affidavit, would not have provided effective rebuttal at trial because it does nothing to demonstrate that Detective Nelson's testimony—that Applicant had tattoos reflecting a gang-association—was in fact wrong.

(393) Applicant admitted to his trial team, to his own experts at trial and in this writ, and to the State's expert that he was a member of the Fish Trap Bloods. (WRR8: 22, 32).

(394) Applicant's brother, Ramon Maddox, Jr. testified at trial Applicant joined a gang when he was about 10 years old. (WRR8: 23-24; RR64: 267-268, 276- 277). The jury also heard testimony from Applicant's step-father, Ramon Maddox, Sr., during the State's cross-examination, that Mr. Maddox heard Applicant was in a gang when Applicant lived

in the Highland Hills area; it was unclear when this was. (RR65: 78-79).

(395) There was no valid evidence Applicant was not in a gang. (WRR8: 22, 24).

(396) Trial counsel could not have proffered Dr. Hagedorn's testimony at trial that he reviewed a discrete set of records and concluded there was no evidence Applicant was a gang member. This testimony would have been highly improper: trial counsel could not support false testimony. Also, such expert testimony would have been contrary on its face to Applicant's own brother's testimony at trial acknowledging Applicant's gang membership.

(397) Dr. Hagedorn authored an essay titled "Gang Stereotypes in Court," in the January 2013 edition of the "Chronicle," which is published by the International Association of Youth and Family Judges and Magistrates. (Lord Affidavit, Exh. D). In this essay, Dr. Hagedorn admits that gangs do real harm, that research shows gang members are typically more violent and criminal than non-gang members, "and this should be kept in mind by judges and juries." (Lord Affidavit, Exh. D).

(398) The Court finds that, if asked, Dr. Hagedorn would have likely admitted in his testimony that some gangs do real harm in society and some gang members are typically more violent and criminal than non-gang members.

(399) Dr. Hagedorn has testified in court in other cases that gang members often do not admit their membership, gang members can be violent and dangerous, gang members commit crimes or violent acts for personal reasons at times and to help the gang at other times, gangs vary from location to location, and to know how a gang operates in an area one must conduct research by speaking with law enforcement, gang members, and local schools. (Lord Affidavit, at 16).

(400) Mr. Parks indicated he believes a defense team would have a "steep hill to climb" to flip gang evidence into mitigating evidence, and such an attempt might not be effective with some jurors. (WRR8: 37-38). In his opinion based on trying cases in Dallas County for many years, Mr. Parks believes some jurors would reject a theory that gang involvement could be mitigating. (WRR8: 38).

(401) Even juvenile street gangs, like the Fish Trap Bloods, commit crimes, and a defense gang expert would be expected to make this admission if asked. (WRR8: 21-22, 24).

(402) If the defense team had brought their own gang expert to trial, the State may have chosen to place greater emphasis on evidence of Applicant's possible ongoing participation in a gang. (WRR8: 29).

(403) If Dr. Hagedorn or a similar gang expert had testified in Applicant's punishment case that his DPD and Dallas County Juvenile Department records do not support a conclusion he was a gang member (Hagedorn Affidavit, at 14), the State could have pointed out in its closing arguments that this opinion is illogical in the face of testimony from Applicant's own brother that Applicant was a member of a gang. (RR64: 267-268, 276-277).

(404) Mr. Parks testified he believes there is a risk that calling a defense gang expert would serve to emphasize the gang evidence before the jury. (WRR8: 24). Mr. Parks believes it made no sense to drag out the testimony about gang membership, particularly because Applicant was no longer a juvenile. (WRR8: 24). Mr. Parks view was to not keep hammering on the issue, rather "[g]et it out the door and move on." (WRR8: 27).

(405) Gang crime was not the focus of this case. The case-in-chief murder did not involve gang-on-gang violence or any direct evidence of gang involvement. (WRR8: 27). There was evidence at trial that Applicant was stealing for personal

gain, to support himself and his family. (WRR8: 27-28). The State did not allege at trial Applicant's robberies were committed with fellow gang members. Applicant's gang affiliation was a collateral issue in the case. There was some innuendo in the record, however, that Applicant had an ongoing affiliation with the gang—based on his tattoos, that he wore one white glove and one red glove (representing the Bloods) when he committed robberies, that he carried a red cell phone, and that he made some drawings containing gang symbols on his legal pad during voir dire. (WRR8: 28-29). The evidence Applicant was not on the Dallas gang roster stood in contrast to this evidence. (WRR8: 28-29).

(406) Dr. Hagedorn's testimony, as presented in his affidavit, presents two contradictory, irreconcilable opinions: first that Applicant's gang affiliation, if any, was a loose and transitory affiliation at a young age (based on a single report in the juvenile records), but second that Applicant only recently acquired his gang tattoos in the Dallas County jail, indicating a recent gang- affiliation. (*See* Hagedorn Affidavit, at 14).

(407) Counsel's decision to challenge the State's gang expert in a 702 hearing, to cross-examine the State's gang expert, and not to elaborate and emphasize the gang evidence through an additional expert fell within reasonable professional norms.

(408) Based on all of the Court's findings related to Ground 2, the lack of presentation of a defense gang expert like Dr. Hagedorn was not deficient and, alternatively, did not prejudice Applicant's defense in the punishment phase.

(409) "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Harrington v. Richter*, 562 U.S. 86, 111 (2011).

(410) Applicant suffered no prejudice when trial counsel did not present a gang expert in Applicant's punishment phase case

to counter the State's expert or to contextualize Applicant's association with the gang.

(411) Dr. Hagedorn's suggestion that an expert could review juvenile and adult criminal records and testify those records contain little evidence of gang membership would have opened the door to the State putting on extraneous offense evidence that had been excluded from evidence. No competent attorney would have undertaken such an action.

(412) Dr. Hagedorn's testimony in Applicant's case would not have altered the outcome of the case.

(413) Applicant fails to prove by a preponderance of the evidence that counsel's decision not to present the testimony of his own gang expert in the punishment phase constituted deficient representation or that it prejudiced his defense. *See Thompson*, 9 S.W.3d at 812 (explaining the standard under *Strickland*).

(414) The State's rebuttal to a defense gang expert would have strongly supported the jury's answer of "yes" to the future-danger special issue. The evidence Applicant presents in this writ proceeding in support of his claim that trial counsel should have presented a gang expert to rebut the State's gang expert is not the type or quality of evidence which would have altered the jury's answers to the special issues.

(415) The evidence Applicant presents in this writ proceeding for his contention that trial counsel should have used a defense gang expert to contextualize Applicant's gang membership as mitigating, when considered along with the whole of the trial evidence, is not evidence which would have changed the jury's answer to the mitigation special issue.

(416) The jury was presented with mitigating evidence about Applicant's difficult childhood, that he was exposed to alcohol and marijuana in utero, that his mother was an inattentive teen parent who frequently left him with others,

that he suffered from ADHD from an early age, that he participated in special education throughout his schooling, that his mother suffered from serious mental illness, that Applicant and his siblings were exposed to violence between their parents at an early age, including witnessing an incident in which one parent wielded a knife and the other an iron, that in his late teens Applicant spent time on the streets, and that Applicant suffered from addiction to PCP and marijuana. The evidence Applicant now claims should have been added to his case—including that his gang membership was a juvenile, short term, and primarily non-violent association which may have substituted for what he was lacking in other areas of his life—is simply insufficient to persuade the jury to change an answer to either of the special issues.

(417) Ground 2 should be denied.

GROUND 3
Counsel's Decision not to Object to Evidence Applicant Wore a Restraint Device During Voir Dire

Applicant contends trial counsel rendered ineffective assistance by not objecting to a State witness's testimony in the punishment phase during cross- examination by the defense attorney that informed the jury Applicant was restrained during trial by a custody control device, or stun belt, and by then eliciting further testimony from the witness about the stun belt. (Application, at 75-83).

Review of a trial counsel's performance is highly deferential, as there is a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance; that is, [applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland,* 466 U.S. at 689.

To establish ineffective assistance of counsel based on a failure to object, an applicant must show the trial court would have committed harmful error in overruling such an objection. *Ex parte Martinez,* 330 S.W.3d 891, 901 (Tex. Crim. App. 2011); *Vaughn v. State,* 931 S.W.2d 564, 566 (Tex. Crim. App. 1996) (en banc) (per curiam). An applicant bears the burden of proving by a preponderance of the evidence that counsel was ineffective, and any allegations of ineffectiveness must be firmly founded in the record. *Thompson,* 9 S.W.3d at 813.

(418) At trial, the State called Bobby Moorehead, a deputy sheriff with the Dallas County Sheriff's Department, who acted as a bailiff during the individual voir dire proceedings in this case. (RR65: 234). Deputy Moorehead identified two drawings Applicant made during the voir dire proceedings. (RR65: 235; SE 164-165). On cross-examination, Mr. Lollar elicited the following information from the witness:

- The bailiffs, defendant, and the parties saw each other daily for a 12-week period during voir dire.
- Voir dire sometimes took place in a courtroom, but if no courtroom was available, it was held in the judges' conference room on the second floor.
- Everyone got to know each other well. Deputy Moorehead and Applicant spoke to each other all the time. Applicant was never disrespectful to Deputy Moorehead.
- Applicant did not give Deputy Moorehead "one minute of trouble" during the 12 weeks.
- Applicant made the drawings while sitting through 12 weeks of "stultifyingly boring" jury selection.
- Applicant knew Deputy Moorehead's first name was Bobby and that he had worked for the Garland Police Department.

- One of Applicant's drawings reflects two people holding guns, one person is labeled "GPD" for Garland Police Department and the other "FWPD." One individual is saying, "Neal [another bailiff for this case] go and get that scumbag. Do you feel lucky, punk? . . . I'm Bobby, the great." A third figure, wearing a Tommy Hilfiger shirt, is saying, "Please don't bust a cap in my ass, Sir Bobby."

- Applicant certainly never tried to assault Deputy Moorehead and was never any trouble to supervise.

(RR65: 236-240).

Trial counsel then elicited testimony regarding an "elevator incident" in which the bailiffs supervising Applicant accidentally left him unattended on the judges' elevator one day on the way to individual voir dire. In describing this incident, Deputy Moorehead spontaneously told the jury Applicant was wearing a stun belt. (RR65: 240-241). Counsel did not object, allowed the witness to explain what the stun belt was, and continued inquiring about the incident, in which both bailiffs stepped off the elevator, the doors closed, and Applicant—through no fault of his own—was left on the elevator alone. (RR65: 241-242). Applicant was not wearing handcuffs or leg irons—only the stun belt. (RR65: 242-243). Applicant did not try to leave the elevator or escape. (RR65: 245). If he had pushed the button, the elevator would have gone to the judicial parking level and opened. (RR65: 244-245). After the elevator traveled up, two court reporters got on the elevator with Applicant; he did not threaten them or anyone else or take anyone hostage. (RR65: 245).

(419) Relying on caselaw that a due process violation may occur if a jury sees or has knowledge a defendant is wearing shackles in the courtroom, Applicant alleges defense counsel has a duty to object when a jury is informed about a defendant's

restraints or shackles. (Application, at 78-80).

(420) At the writ hearing, Mr. Lollar testified that if the State had not planned to call Deputy Moorehead as a witness, he had planned to call him to testify about the January 9, 2012 incident in which the bailiffs inadvertently left Applicant on the elevator, allowing him to ride the elevator unattended. (WRR4: 107-109). Applicant was dressed in a suit, wearing no handcuffs or leg irons. (WRR4: 110). He rode the elevator to the seventh floor (and did not get off). (WRR4: 110). Without recognizing Applicant, two court reporters got on the elevator; when one of them mentioned this case, Applicant, standing behind them, told them he was the defendant. (WRR4: 110-111). Applicant made no attempt to escape. (WRR4: 111).

(421) Mr. Lollar explained at the writ hearing that the defense team "felt that was, again, powerful evidence to show a jury that he would not be a future danger once he's off of PCP, and like he had been for three years waiting to go to trial. We thought that was evidence that he could be trusted in that type of a situation." (WRR4: 111).

(422) Mr. Lollar testified that when Deputy Moorehead interjected the information about the RACC, or stun belt, into the description of what happened, he made a strategy decision at that point. (WRR4: 111-112). He believed the information being conveyed to the jury—describing what could have been a very bad situation that turned out positively—outweighed the jury learning that Applicant was wearing a stun belt. (WRR4: 113).

(423) The complained-of testimony occurred during the punishment phase of trial. (RR65: 240-245; WRR4: 113). Thus, the presumption-of-innocence concerns connected to circumstances in which a jury observes a defendant wearing restraints during the guilt/innocence phase of trial do not apply here.

(424) The testimony indicated Applicant wore the stun belt during the 12 weeks of individual voir dire, when voir dire was sometimes held in a conference room instead of a courtroom. (RR65: 240). Neither the prosecutor, the defense attorney, nor Deputy Moorehead indicated Applicant was wearing the stun belt during the jury trial portion of the proceedings. (RR65: 240- 248; WRR4: 113-114). Moreover, there was a substantial lapse in time between the individual voir dire and the jury proceedings. (WRR4: 113). Individual voir dire was held from January 9, 2012 through February 29, 2012. (RR9 – RR38). The jury trial did not begin until May 8, 2012. (RR58).

(425) Applicant fails to demonstrate by a preponderance of the evidence that counsel's decision not to object to this evidence or by soliciting further evidence to explain the circumstances to the jury was deficient or that it prejudiced his defense.

(426) To prove counsel was deficient, an applicant must rebut the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Thompson*, 9 S.W.3d at 812-13. Applicant fails to rebut this presumption.

(427) Evidence of the elevator incident strongly supported Applicant's trial theory that he was not a danger when he was detained and had no access to PCP.

(428) Mr. Lollar solicited the description of the elevator incident for a strategic reason—to demonstrate Applicant was neither a danger nor a flight risk while in custody. In a highly unusual incident, Applicant traveled up and down an elevator in the courthouse unattended. He proved himself not to be opportunistic in the face of someone else's vulnerability. He could have stepped off the elevator when the court reporters got on or potentially accessed a parking garage and fled. From Applicant's perspective, this was valuable evidence to offer to the jury in Applicant's favor.

(429) Importantly, the parties did not inform the jury that Applicant was wearing the stun belt during the jury trial proceeding. (WRR4: 113-114). Nothing in the record affirmatively indicates the jurors knew Applicant wore the stun belt before the jury. The jurors may have reasonably believed the stun belt was utilized due to the close quarters in the conference room for voir dire. Further, the issue of the stun belt was raised in evidence during the punishment phase of trial, not the guilt/innocence phase of trial, when the presumption of innocence is key.

(430) Counsel's decision to solicit testimony from Deputy Moorehead about the elevator incident, even if at the same time the Court allowed evidence about the stun belt, was a strategy decision.

(431) Counsel's decision not to object to Deputy Moorehead's reference to the fact Applicant wore a restraint device during voir dire was based on reasonable trial strategy.

(432) Even assuming trial counsel's decision not to object was deficient, Applicant fails to demonstrate by a preponderance of the evidence any resulting prejudice.

(433) Regarding the future dangerousness special issue, when general evidence that Applicant wore a stun belt during some court proceedings is balanced with the information of Applicant's favorable behavior during the elevator incident, at worst for Applicant's case, the favorable behavior weighed evenly in the jury's consideration to cancel out the negative factor of the stun belt, and Applicant did not suffer any prejudice.

(434) It is highly unlikely that the jury's knowledge of the stun belt, which at worst countered the favorable evidence of the elevator incident, weighed so strongly that without it, the jury would have answered one of the special issues in Applicant's favor.

(435) Knowledge of the stun belt would have been irrelevant to the mitigation special issue; however, the favorable evidence of the elevator incident might have influenced a juror to answer "yes" to the mitigation special issue.

(436) Applicant fails to demonstrate a reasonable probability that, but for counsel's decision not to object to evidence regarding the stun belt, the result of Applicant's proceeding would have been different.

(437) Additionally, Applicant has not met his burden to show the trial court would have committed harmful error in overruling the objection had trial counsel objected. *See Vaughn,* 931 S.W.2d at 566.

(438) Ground 3 should be denied.

GROUND 4
Admission of Medical Examiner's Testimony and Forensic Evidence Related to the Death of Carlos Gallardo

In Ground 4 of his writ application, Applicant contends he was denied due process because the Court erred in overruling trial counsel's pre-trial objections to the admission of Carlos Gallardo's autopsy photos and because trial counsel rendered ineffective assistance in the guilt/innocence phase of trial by failing to object to the admissibility of the medical examiner's testimony about Carlos Gallardo—which was allegedly unduly graphic and prejudicial. (Application, at 84- 95).

Applicant contends the murder of Carlos Gallardo was an extraneous offense, and subject to Texas Rules of Evidence 401 (relevance), 403 (prejudice), and 404(b) (extraneous offense exceptions). (Application, at 86-88).

(439) To demonstrate ineffective assistance of counsel for failure to object to the admission of testimony, an applicant must identify the specific objection and prove that it would have been successful. *Ortiz v. State,* 93 S.W.3d 79, 93 (Tex. Crim.

App. 2002). An isolated failure to object does not amount to deficient representation because whether "counsel provides a defendant adequate assistance is to be judged by the totality of the representation rather than by isolated acts or omissions." *Vasquez v. State,* 819 S.W.2d 932, 938 (Tex. App.—Corpus Christi 1991, pet. ref'd) (finding counsel's performance was not deficient, given the totality of the circumstances, though he made the wrong objection to a jury argument).

(440) Defense counsel's failure to object to admissible evidence does not constitute ineffective assistance of counsel. *Lee v. State,* 29 S.W.3d 570, 579–580 (Tex. App.—Dallas 2000, no pet.); *see Ex parte Jimenez,* 364 S.W.3d 866, 887 (Tex. Crim. App. 2012) ("The failure to object to proper questions and admissible testimony . . . is not ineffective assistance.").

(441) Applicant shot and killed Carlos Gallardo immediately after killing Alfredo Gallardo, the named complainant in this capital murder case. (RR58: 82, 104, 107, 110, 116, 118). The two murders were so intertwined that excluding evidence of Carlos Gallardo's murder would have made the State's case incomplete.

(442) The autopsy photos and medical examiner's testimony related to Carlos Gallardo were relevant and admissible as same-transaction contextual evidence.

(443) At the writ hearing, Mr. Lollar indicated that he believed evidence related to the killing of Carlos Gallardo, such as the autopsy photos and medical examiner's testimony, was admissible as same-transaction contextual evidence. (WRR4: 115-117).

(444) Extraneous-offense evidence may be admissible as same-transaction contextual evidence when several offenses are so intermixed, blended, or connected as to form a single, indivisible criminal transaction, such that in narrating the one, it is impracticable to avoid describing the other. *Pribble v. State,* 175 S.W.3d 724, 731 (Tex. Crim. App. 2005); *McDonald*

v. State, 179 S.W.3d 571, 577 (Tex. Crim. App. 2005); *Rogers v. State,* 853 S.W.2d 29, 33–34 (Tex. Crim. App. 1993). For extraneous evidence to fall into this category, the extraneous matter must be so intertwined with the charged crime that avoiding reference to it would make the State's case incomplete or difficult to understand. *Prible,* 175 S.W.3d at 732.

(445) An offense is not tried in a vacuum; the jury is entitled to know all relevant surrounding facts and circumstances of the charged offense. *Prible,* 175 S.W.3d at 732; *Wyatt v. State,* 23 S.W.3d 18, 25-26 (Tex. Crim. App. 2000) (holding evidence that defendant sexually assaulted child before smothering the child constituted same-transaction contextual evidence); *Wesbrook v. State,* 29 S.W.3d 103, 114–15 (Tex. Crim. App. 2000) (holding evidence that defendant committed three other homicides on night of charged homicide constituted same-transaction contextual evidence).

(446) It was reasonable for trial counsel to believe the murder of Carlos Gallardo was sufficiently intertwined with the charged offense to be same-transaction contextual evidence.

(447) Defense counsel's performance was not deficient. He did not object based on his reasonable belief that evidence of Carlos Gallardo's murder was admissible as same-transaction contextual evidence.

(448) During the home invasion robbery, Applicant forced the family from the living room through the master bedroom and bathroom and into the master bedroom closet. (RR58: 89-90, 93-94, 131-133). While the family was in the closet, they heard Applicant ransacking the house. (RR58: 96-98, 133; SE 19). Applicant started to remove first the mother and then the daughter from the closet. (RR58: 100-101, 134, 136). Applicant then pointed the gun at Alfredo and grabbed his shirt, pulling him out of the closet and into the adjacent bathroom. (RR58: 101-103, 136, 148-149). Carlos followed.

(RR58: 104, 116, 137). Applicant and Alfredo fell into a large Jacuzzi tub, and Applicant began shooting. (RR58: 102-103, 113-116). Applicant shot Alfredo first. (RR58: 106). He continued to shoot, killing Carlos, who had crouched down near the bathroom sink at the first gunshots. (RR58: 104, 107, 116). After shooting the men, Applicant left. (RR58: 107).

(449) In addition, Applicant has failed to demonstrate that the Court would have abused its discretion by overruling a Rule 401, Rule 402, Rule 403, or Rule 404(b) objection to the medical examiner's testimony. (*See* Application, at 89-94).

(450) Because this evidence was admissible, Applicant cannot demonstrate the Court would have committed error in admitting the medical examiner's testimony over objection.

(451) As to the medical examiner's testimony, Applicant has failed to meet the first prong of *Strickland* to establish deficient performance.

(452) Moreover, Applicant cannot show prejudice. He fails to show that even if trial counsel had objected and the Court had sustained the objection, the outcome of the guilt/innocence phase would have been any different.

(453) Applicant seems to incorporate in this complaint an allegation that the Court erred by overruling his pre-trial objections to the autopsy photos of Carlos Gallardo. Such a claim, however, is based on the rules of evidence, or state statutory law. Violations of state statutory law are not cognizable in a habeas application. *See Ex parte Graves*, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002). Habeas corpus is available only to review jurisdictional defects or denials of fundamental or constitutional rights. *See Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989). Accordingly, Applicant's complaints regarding the Court's denial of his objections to the autopsy photos are not cognizable on habeas review and should be denied.

(454) Applicant fails to demonstrate a denial of due process based on this Court overruling his evidentiary objections to the admission of Carlos Gallardo's autopsy photos.

(455) Applicant has not demonstrated trial counsel rendered ineffective assistance by not objecting to the admissibility of the medical examiner's testimony about Carlos Gallardo's autopsy.

(456) Trial counsel rendered effective assistance.

(457) Applicant very briefly asserts in this issue that appellate counsel was ineffective for failing to raise the admissibility of the medical examiner's testimony on appeal. (Application, at 84, 88). Appellate counsel was not deficient, however, for failing to raise a frivolous issue on appeal. Because the medical examiner's testimony was admissible, was relevant, and was not subject to exclusion under Rules 404(b) or 403, appellate counsel was not deficient for not raising the issue.

(458) Appellate counsel did not render ineffective assistance related to this claim.

(459) Ground 4 should be denied.

GROUND 5
Counsel's Alleged Failure to Object to Certain Evidence During the Guilt/Innocence Phase of Trial

In Ground 5, Applicant contends trial counsel rendered ineffective assistance and he was denied due process when counsel did not raise guilt/innocence phase complaints about the admission of (a) crime scene photographs and testimony by police officers regarding their attempts to save Alfredo Gallardo's life at the scene, (b) recurrent references in other police officers' testimony that Applicant shot at the officers when he exited the Gallardo's trailer, (c) a gun, ammunition, and gloves seized from Applicant's vehicle, which authorities found parked in the driveway next door, and (d) a jail book-in sheet which identified Applicant's vehicle.

(Application, at 96-102).

(460) To prove counsel was deficient, Applicant must rebut the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *See Thompson*, 9 S.W.3d at 812-13. Applicant fails to rebut this presumption.

(461) To establish ineffective assistance of counsel based on a failure to object, an applicant must show the trial court would have committed harmful error in overruling such an objection. *Martinez,* 330 S.W.3d at 901.

(462) Applicant complains of trial counsel's failure to object to the admission of Officer Bronc McCoy's and Officer Daniel Fogle's descriptions of their efforts to save Alfredo Gallardo's life under Texas Rule of Evidence 403, and to State's Exhibits 31-42 (crime scene photos). (Application, at 98-100).

(463) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in his counsel's failure to object to crime scene photos and first- responder testimony about attempts to save Alfredo Gallardo's life, much less any resulting prejudice.

(464) Evidence of Applicant's guilt for the capital murder of Alfredo Gallardo was strong. He was the only assailant who entered the home. Multiple witnesses saw and interacted with him during the robbery. Police officers surrounded the trailer while he was still inside it. He exchanged gunfire with police upon exiting the trailer, was shot, and was apprehended at the scene. In the guilt/innocence phase, he challenged the evidence of his intent to kill Alfredo Gallardo.

(465) Because evidence of Applicant's guilt was strong, Applicant fails to demonstrate a reasonable probability that, but for counsel's failure to object to crime scene photos and first-responder testimony about attempts to save Alfredo Gallardo's life, the result of the proceeding would have been

different.

(466) Applicant complains of trial counsel's failure to object to the admission of testimony by five officers from the scene to Applicant's attempts to shoot at them when he exited the Gallardo's trailer, on the basis the testimony was prejudicial, minimally relevant to culpability, and cumulative. (Application, at 100-101).

(467) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in his counsel's failure to object to recurrent references by police officers that Applicant shot at them when he exited the Gallardo's trailer, much less any resulting prejudice.

(468) Applicant fails to demonstrate a reasonable probability that, but for counsel's decision not to object to recurrent references by police officers that Applicant shot at them when he exited the Gallardo's trailer, the result of the proceeding would have been different.

(469) Applicant complains of trial counsel's failure to object to the admission of evidence seized from the Ford Crown Victoria, including a .22 caliber submachine gun, ammunition, and gloves, on the bases of Rules 401, 403, and 404(b). (Application, at 101-102). Applicant drove the car to the scene that night and parked it in the driveway next door.

(470) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in his counsel's failure to object to evidence regarding a gun, ammunition, and gloves seized from his vehicle, which authorities found parked in the driveway next door, much less any resulting prejudice.

(471) Applicant fails to demonstrate a reasonable probability that, but for counsel's failure to object to evidence regarding a gun, ammunition, and gloves seized from Applicant's vehicle, which authorities found parked in the driveway next door, the result of the proceeding would have been different.

(472) Applicant complains of trial counsel's failure to object to the admission of State's Exhibit 46, Applicant's book-in sheet for the Dallas County jail because it was "the only link between [Applicant] and the vehicle next door." (Application, at 102). Applicant alleges trial counsel should have objected on the basis of hearsay and Texas Rule of Evidence 901. (Application, at 102-103). Applicant alleges that if the book-in sheet had not been admitted, the State could not have laid the proper foundation for admission of the items from the vehicle. (Application, at 102).

(473) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in his trial counsel's failure to object to evidence of a jail book- in sheet which identified Applicant's vehicle, much less any resulting prejudice. Mr. Lollar testified at the writ hearing that the links between Applicant and the vehicle in the driveway next door included that, not only had Applicant driven it to the scene and planned to drive it home that night, but also the police discovered a person hiding in the vehicle who had been waiting for Applicant. (WRR4: 122-123).

(474) Applicant also fails to demonstrate a reasonable probability that, but for trial counsel's failure to object to admission of the jail book-in sheet, the result of the proceeding would have been different.

(475) In his complaints in Ground 5, Applicant fails to show the trial court would have committed harmful error in overruling the proposed objections.

(476) The allegations in Ground 5 did not collectively prejudice Applicant's case.

(477) Applicant raises a claim that, to the extent the claims in Ground 5 should have been raised on appeal, appellate counsel was ineffective for failing to present them. (Application, at 95, 103-104). The Court denies this claim; Applicant fails to prove deficient performance or prejudice under *Strickland.*

(478) Ground 5 should be denied.

GROUND 6
"As Applied" Challenge to Article 37.071's Mandate Not to Tell Jurors that Failure to Reach a Verdict Results in a Life Sentence

Applicant's Ground 6 is based on his pre-trial request for a jury instruction that a life sentence would result if the jury were unable to answer one of the special issues in accordance with the parameters set out in the Court's instructions. The Court denied Applicant's request because such an instruction is directly contrary to Article 37.071 of the Texas Code of Criminal Procedure.

In Ground 6, Applicant alleges the statutorily-mandated instructions violate the Eighth and Fourteenth Amendments and that Article 37.071 "as applied" to him deprived him of a fair sentencing hearing. (Application at 85-89, 104, 106-109). In support of his claim, he submitted an affidavit by Juror Gail Mackey describing the jury's deliberations in this case. (Application Exh. 14).

In *Saldano v. State*, 232 S.W.3d 77 (Tex. Crim. App. 2007), Saldano complained the trial court erred in not informing the jury that failure to unanimously agree on the special issue would have the same legal effect as an answer in the defendant's favor. *Id.* at 106. Saldano further alleged the court's instruction requiring 10 jurors to agree in order to answer the future-dangerousness special issue "no" was a misrepresentation. *Id.* The Court of Criminal Appeals rejected Saldano's challenges. *Id.* at 107.

Article 37.071, Section 2(a)(1) of the Texas Code of Criminal Procedure provides that "[t]he court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted [under this Article]." The constitutionality of this provision has been repeatedly upheld. *See,*

e.g., Freeman v. State, 340 S.W.3d 717, 731 (Tex. Crim. App. 2011) (noting the court had previously rejected complaints that the Texas death penalty scheme is unconstitutional because jurors cannot be told of the effect of even one life vote); *Busby v. State*, 990 S.W.2d 263, 272 (Tex. Crim. App. 1999) (rejecting claim that the failure to inform a jury that a holdout vote or hung jury results in the automatic imposition of a life sentence violates the Eighth and Fourteenth Amendments to the United States Constitution).In the punishment phase, the Court charged the jury pursuant to Texas's statutorily-mandated instructions in death penalty cases. *See* Tex. Code of Crim. Proc. Ann. art. 37.071, § 2(a)(1), (b)(1), (e)(1).

(479) In accordance with Article 37.071, the Court submitted two special issues to the jury, the first concerning whether Applicant is a future danger and the second regarding mitigating circumstances:

> Special Issue No. 1: Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Roderick Harris, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Special Issue No. 2: Do you find, taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, Roderick Harris, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed?

(CR2: 678-679).

(480) The Court also instructed the jury, as required by Texas law, that to answer the issues in such a way as to result in a death sentence, all twelve jurors must answer "yes" to the

future dangerousness special issue and "no" to the mitigation special issue. (CR2: 679-680). To answer either issue in the defendant's favor (a "no" to the future dangerousness issue or a "yes" to the mitigation issue), at least ten jurors had to agree, as required by Texas law. (CR2: 679-680). This is generally referred to as the "10/12 rule."

(481) The Court correctly overruled Applicant's request to inform the jury that failure to respond to one of the special issues in accordance with the Court's punishment phase instructions would result in a life sentence. *See, e.g., Freeman,* 340 S.W.3d at 731.

(482) Both state and federal courts have repeatedly rejected constitutional challenges to the 10/12 rule even when a claim is based on *Mills v. Maryland,* 486 U.S. 367 (1988). (*See* Application, at 109-110). *Allen v. Stephens,* 805 F.3d 617, 631-32 (5th Cir. 2015), *abrogated in part on other grounds by Ayestas v. Davis,* 138 S. Ct. 1080 (2018); *Turner v. Quarterman,* 481 F.3d 292, 300 (5th Cir. 2007) (federal precedent forecloses argument that Eighth Amendment and due process require death penalty jury to be informed of consequence of deadlock); *Jones v. United States,* 527 U.S. 373, 381 (1999) (Eighth Amendment does not require death penalty jury to be instructed on the consequence of a deadlock); *Soliz v. State,* 432 S.W.3d 895, 904 (Tex. Crim. App. 2014); *Russeau v. State,* 171 S.W.3d 871, 886 (Tex. Crim. App. 2005).

(483) Applicant alleges that because the Texas statutory scheme "misinforms the jury and brings outside considerations that impermissibly bear on the jury's verdict, the Texas statute ["as applied" to him violated] the principles of the Eighth and Fourteenth Amendments, depriving [him] of a fair sentencing trial." (Application, at 106). The outside influences Applicant refers to are the 10-12 rule itself and juror discussions during deliberations whether failure to reach a unanimous verdict would result in a mistrial. (Application, at 107-109, 111-112).

(484) In addition to his "as applied" claim, which is based on Juror Mackey's affidavit, Applicant asserts (in a footnote) that Article 37.071 is facially unconstitutional due to the improper inhibitive effects of the 10/12 rule on juror deliberations and the statutorily mandated sentencing instructions regarding the number of votes required for a life sentence. (Application, at 112).

(485) On direct appeal, Applicant alleged both that (a) the Court erred in not allowing him to inform jurors that the judge would assess a life sentence if the jury was unable to reach a verdict on either of the special issues and (b) the 10/12 rule is unconstitutional. The Court of Criminal Appeals rejected these complaints. *See Harris*, 2014 WL 2155395, at *18.

(486) Habeas corpus is not to be used to re-litigate matters that were addressed on appeal. *See Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994); *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984).

(487) Because Applicant's facial constitutional challenge was raised and rejected on direct appeal, it is not cognizable in this habeas proceeding.

(488) Further, to the extent Applicant raises any new facial claims to the 10/12 rule, if any, these claims are procedurally barred. *See Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001) (indicating that the writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal); *Ex parte Bagley*, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974).

(489) Applicant briefly alleges that the 10/12 rule and the provision that jurors may not be told of the result of a failure to answer the special issues violate state statutory law and state case law. (Application, at 104). Violations of state statutory law, however, are not cognizable in a habeas application. *See Ex parte Graves*, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002). Habeas corpus is available only to review jurisdictional defects or denials of fundamental or

constitutional rights. *See Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989). Accordingly, Applicant's statutory complaints about Article 37.071 are not cognizable on habeas review and should be denied.

(490) In support of his "as applied" challenge to Article 37.071, Applicant presents an affidavit from Juror Mackey, describing the jury's deliberations. (Application Exh. 14).

(491) Juror Mackey's affidavit describes her individual deliberation process and the group's deliberation process. It conveys numerous statements by other jurors during deliberations and provides analysis of the deliberations. Juror Mackey describes her own thought processes and the reasons she changed her vote. She states in her affidavit that she believed there were mitigating circumstances and she wanted Applicant to receive a sentence of life without parole. She explains that two other jurors also initially voted for life without parole with her but ultimately all three changed their votes. Juror Mackey indicates that, of the three, she was the second person to change her vote. Juror Mackey states the jury foreman wanted the vote to be unanimous; so, although she would have been happy to continue deliberating, she changed her vote. (Application Exh. 14).

(492) Juror Mackey's affidavit is not admissible in this proceeding. With very few exceptions which are inapplicable here, the Supreme Court's ruling in *Pena- Rodriguez v. Colorado*[11] and Texas Rule of Evidence 606(b) preclude the use of juror testimony about deliberations to challenge a judgment.

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[11] 137 S. Ct. 855 (2017).

(493) Texas Rule of Evidence 606(b)(1) provides that juror deliberations cannot be used to challenge a judgment:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Tex. R. Evid. 606(b)(1).

(494) There are only two statutory exceptions to this rule. A juror may testify "about whether an outside influence was improperly brought to bear on any juror," and "to rebut a claim that the juror was not qualified to serve." Tex. R. Evid. 606(b)(2)(A), (B).

(495) The Court finds neither exception in Rule 606(b) applies here.

(496) Generally, unless allowed by statute, a party cannot go behind the verdict to question jurors regarding their deliberations. *See Tanner v. United States,* 483 U.S. 107, 127 (1987) (rejecting a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the trial).

(497) Also, in *Pena-Rodriguez v. Colorado,* 137 S. Ct. 855, 862 (2017), the Supreme Court recognized the general rule of substantial protection of verdict finality: once a verdict has been entered, it cannot be questioned later based on comments or conclusions jurors expressed during their deliberations. *Pena-Rodriguez,* 137 S. Ct. at 861. The Court did, however, establish a narrow non-statutory exception to the "no impeachment" rule for deliberations involving racial animus. *Pena-Rodriguez,* 137 S. Ct. at 869. The *Pena-*

Rodriguez exception does not apply here.

(498) Without mentioning Rule 606(b), Applicant proffers Juror Mackey's testimony under the outside influence exception. Applicant claims Juror Mackey's affidavit demonstrates that the 10/12 rule allowed the jury to consider outside influences during jury deliberations because the Court misled the jurors as to the result of their failure to reach a unanimous or 10-person agreement and the jury was coerced "into [a] death sentence[] on the basis of stimuli divorced from the merits of the case." (Application, at 108). The Court finds this contention is without merit.

(499) An outside influence is something originating from a source outside the jury room and from other than the jurors themselves—in other words, other than from the jurors' own personal knowledge and experience (although an outside influence does not include influences or information not related to the trial issues). *Colyer v. State*, 428 S.W.3d 117, 125, 127 (Tex. Crim. App. 2014). Furthermore, an outside influence must be "improperly brought to bear" with an intent to influence the jury. *Id.* at 128-129; Tex. R. Evid. 606(b).

(500) Examples of outside influences include (1) internet research on the effects of a date rape drug at issue in the case, (2) factual or legal information conveyed to the jury through court personnel or an unauthorized person who intends to affect the deliberations, or (3) a threat made against the safety of a juror's family member. *Colyer*, 428 S.W.3d at 125. Examples of information or events that do not amount to outside influences under Rule 606(b) include hearing a weather report of an approaching storm that causes pressure to hasten deliberations, coercion by a fellow juror, discussion of a juror's own personal knowledge, or a call from the juror's doctor about an ill child that induces the juror to agree with the verdict. *Id.* at 125, 128-129.

(501) The Court finds Juror Mackey's affidavit is not competent, admissible evidence, and the Court is not considering it in

this proceeding. *See* Tex. R. Evid. 606(b)(1); *Hicks v. State*, 15 S.W.3d 626, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (upholding trial court's finding that juror affidavit describing jury deliberations was inadmissible under 606(b)); *Sanders v. State*, 1 S.W.3d 885, 886, 888 (Tex. App.—Austin 1999, no pet.) (jurors could not testify about their misinterpretation of the trial court's statutory instructions under Rule 606(b)).

(502) Alternatively even if the Court were to consider Juror Mackey's affidavit, nothing in the affidavit indicates an outside influence impacted this jury. An outside influence is something outside of both the jury room and the juror: it refers to a force external to the jury and its deliberations. *White v. State*, 225 S.W.3d 571, 574 (Tex. Crim. App. 2007). What Juror Mackey describes in her affidavit was merely the deliberative process in this case. Pressure from other jurors in the jury room to wrap up deliberations is not an outside influence and is not the proper subject of a writ. *See Franks v. State*, 90 S.W.3d 771, 800 (Tex. App.—Fort Worth 2002, no pet.) (holding that a juror's claim the other jurors forced her to change her vote is not an outside influence).

(503) Applicant alleges the 10/12 rule and Juror Mackey's or the jury's misunderstanding of the 10/12 rule acted as an outside influence rather than as a proper incentive to reach a verdict. (Application, at 109).

(504) This Court finds the 10/12 rule and Juror Mackey's—or the jury's— misunderstanding, if any, of the 10/12 rule did not act as an outside influence. *See Franks*, 90 S.W.3d at 800-802 (trial court's instruction was not an outside influence).

(505) The jury's consideration and debate regarding the court's instructions emanated from within the jury and did not amount to an outside influence. Juror Mackey's recollection that at least one juror voiced an opinion that a non-unanimous vote would result in a mistrial was not an outside influence. The comment or belief, though mistaken, originated from a juror in the jury room and emanated from

the juror's own personal knowledge and experience. This opinion was not an outside influence, and Rule 606(b) does not allow testimony that the jury decided a case based on a juror's incorrect interpretation of the law. *See Hines v. State*, 3 S.W.3d 618, 621 (Tex. App.— Texarkana 1999, pet. ref'd).

(506) Nothing in Juror Mackey's affidavit originated from sources outside of information from the Court (i.e. the Court's instructions) or the jury's deliberations; the affidavit, though improper evidence here, arises from the jurors' understanding, opinions, and thoughts regarding the Court's instructions.

(507) The complained-of statutorily-mandated instructions in Article 37.071 do not violate the Eighth and Fourteenth Amendments, and Article 37.071 "as applied" to Applicant did not deprive him of a fair sentencing hearing.

(508) Ground 6 should be denied.

CONCLUSION

(509) Applicant has not been denied any rights guaranteed him by the United States and Texas Constitutions.

(510) Applicant's Application for Writ of Habeas Corpus is without merit. The Court recommends that all relief requested be denied.

THE CLERK IS **ORDERED** to prepare a transcript of all papers in cause number W09-00409-Y(A) and to transmit the same to the Texas Court of Criminal Appeals as provided by article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. Applicant's Original Application for Writ of Habeas Corpus and all other pleadings filed by Applicant, including any exhibits, excepting:

(a) Applicant's "Supplemental Bone Lead Evidence – Bone Lead Testing Result for Pamela Maddox," filed December 4, 2018; and

(b) Expert Rebuttal Affidavit of Dr. Julian Davies, dated April 4, 2019, attached as Exhibit C to "Roderick Harris's Submission of Additional Evidence Pursuant to the Court's November 26, 2018 Order," filed June 12, 2019.

2. The State's Answer to Applicant's Original Writ Application and all other pleadings filed by the State;

3. The proposed findings of fact and conclusions of law filed by the State and Applicant;

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

6. Any and all orders issued by the Court; and

7. The indictment, judgment, sentence, docket sheet, and appellate record in cause number F09-00409-Y, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of this Court's signed findings of fact and conclusions of law to the following counsel:

Benjamin Wolff
Benjamin.Wolff@ocfw.texas.g
ov Office of Capital and
Forensic Writs 1700 N.
Congress Ave., Suite 460
Austin, TX 78701

Gwendolyn Payton
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1420 Fifth Avenue, Suite 700
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Shelly O'Brien Yeatts, Assistant District Attorney syeatts@dallascounty.org
Dallas County District Attorney's Office
Frank Crowley Courts Bldg.
133 N. Riverfront Blvd., LB-19
Dallas, TX 75207-4399.

SIGNED the 31st day of March, 2020.

Chika Anyiam
Judge Chika Anyiam

APPENDIX C

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

1/27/2021
HARRIS, RODERICK **Tr. Ct. No. F09-00409** **WR-80,923-01**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

RODERICK HARRIS
C/O BENJAMIN WOLFF
1700 N CONGRESS AVENUE, SUITE 460
AUSTIN, TX 78711

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

1/27/2021
HARRIS, RODERICK **Tr. Ct. No. F09-00409** **WR-80,923-01**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

DISTRICT CLERK DALLAS COUNTY
FELICIA PITRE
133 N. RIVERFRONT BLVD., LB 12
DALLAS, TX 75207-4300
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

1/27/2021
HARRIS, RODERICK **Tr. Ct. No. F09-00409** **WR-80,923-01**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

BENJAMIN WOLFF
OFFICE OF CAPITAL AND FORENSIC WRITS
1700 NORTH CONGRESS AVE SUITE 460
AUSTIN, TX 78701
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

1/27/2021
HARRIS, RODERICK **Tr. Ct. No. F09-00409** **WR-80,923-01**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

PRESIDING JUDGE CRIMINAL DISTRICT COURT
NO. 7 DALLAS COUNTY
133 N RIVERFRONT BLVD., LB 11
DALLAS, TX 75207-4313
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

1/27/2021
HARRIS, RODERICK **Tr. Ct. No. F09-00409** **WR-80,923-01**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

EDWARD L. MARSHALL
ASSISTANT ATTORNEY GENERAL
PO BOX 12548
AUSTIN, TX 78711
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

1/27/2021
HARRIS, RODERICK **Tr. Ct. No. F09-00409** **WR-80,923-01**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

DEBRA GIBBS
ASSISTANT DIRECTOR
RECORDS & CLASSIFICATIONS
P. O. BOX 99
HUNTSVILLE, TX 77340
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

1/27/2021
HARRIS, RODERICK **Tr. Ct. No. F09-00409** **WR-80,923-01**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

DISTRICT ATTORNEY DALLAS COUNTY
FAITH JOHNSON
APPELLATE SECTION
133 N. RIVERFRONT BLVD, LB 19
DALLAS, TX 75207
* DELIVERED VIA E-MAIL *

APPENDIX D

Vernon's Texas Statutes and Codes Annotated
Code of Criminal Procedure (Refs & Annos)
Title 1. Code of Criminal Procedure
Habeas Corpus
Chapter Eleven. Habeas Corpus (Refs & Annos)

Vernon's Ann.Texas C.C.P. Art. 11.071

Art. 11.071. Procedure in death penalty case

Effective: September 1, 2015

Currentness

Sec. 1. Application to Death Penalty Case

Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Sec. 2. Representation by Counsel

(a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital and forensic writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital and forensic writs or, if the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section, the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) Repealed by Acts 2009, 81st Leg., ch. 781, § 11.

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital and forensic writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital and forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.[1]

Sec. 2A. State Reimbursement; County Obligation

(a) The state shall reimburse a county for compensation of counsel under Section 2, other than for compensation of counsel employed by the office of capital and forensic writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital and forensic writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed $25,000. Compensation and expenses in excess of the $25,000 reimbursement provided by the state are the obligation of the county.

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed $25,000.

(c) The limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement, and a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement.

(d) The comptroller shall reimburse a county for the compensation and payment of expenses of an attorney appointed by the court of criminal appeals under prior law. A convicting court seeking reimbursement for a county as permitted by this subsection shall certify the amount the county is entitled to receive under this subsection for an application filed under this article, not to exceed a total amount of $25,000.

Sec. 3. Investigation of Grounds for Application

(a) On appointment, counsel shall 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) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital and forensic writs.

Sec. 4. Filing of Application

(a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

(1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and

(2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

Sec. 4A. Untimely Application; Application Not Filed

(a) On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date.

(b) At the conclusion of the counsel’s presentation to the court of criminal appeals, the court may:

(1) find that good cause has not been shown and dismiss the application;

(2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or

(3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

(c) The court of criminal appeals may hold in contempt counsel who files an untimely application or fails to file an application before the date required by Section 4(a) or (b). The court of criminal appeals may punish as a separate instance of contempt each day after the first day on which the counsel fails to timely file the application. In addition to or in lieu of holding counsel in contempt, the court of criminal appeals may enter an order denying counsel compensation under Section 2A.

(d) If the court of criminal appeals establishes a new filing date for the application, the court of criminal appeals shall notify the convicting court of that fact and the convicting court shall proceed under this article.

(e) Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

(f) Notwithstanding any other provision of this article, the court of criminal appeals shall appoint counsel and establish a new filing date for application, which may be no later than the 270th day after the date on which counsel is appointed, for each applicant who before September 1, 1999, filed an untimely application or failed to file an application before the date required by Section 4(a) or (b). Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

Sec. 5. Subsequent Application

(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under

Article 37.071, 37.0711, or 37.072.

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

Sec. 6. Issuance of Writ

(a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b-1) If the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint, in order of priority:

(1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment;

(2) the office of capital and forensic writs, if the office represented the applicant in the proceedings under Section 5 or otherwise accepts the appointment; or

(3) counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code, if the office of capital and forensic writs:

(A) did not represent the applicant as described by Subdivision (2); or

(B) does not accept or is prohibited from accepting the appointment under Section 78.054, Government Code.

(b-2) Regardless of whether the subsequent application is ultimately dismissed, compensation and reimbursement of expenses for counsel appointed under Subsection (b-1) shall be provided as described by Section 2, 2A, or 3, including compensation for time previously spent and reimbursement of expenses previously incurred with respect to the subsequent application.

(c) The clerk of the convicting court shall:

(1) make an appropriate notation that a writ of habeas corpus was issued;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) send a copy of the application by certified mail, return receipt requested, or by secure electronic mail to the attorney representing the state in that court.

(d) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the applicant and the attorney representing the state.

Sec. 7. Answer to Application

(a) The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension, but in no event may the court permit the state to file an answer later than the 180th day after the date the state receives notice of issuance of the writ.

(b) Matters alleged in the application not admitted by the state are deemed denied.

Sec. 8. Findings of Fact Without Evidentiary Hearing

(a) Not later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

(b) If the convicting court determines the issues do not exist, the parties shall file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a), whichever occurs first.

(d) The clerk of the court shall immediately send to:

(1) the court of criminal appeals a copy of the:

(A) application;

(B) answer;

(C) orders entered by the convicting court;

(D) proposed findings of fact and conclusions of law; and

(E) findings of fact and conclusions of law entered by the court; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

Sec. 9. Hearing

(a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

(b) The convicting court shall hold the evidentiary hearing not later than the 30th day after the date on which the court enters the order designating issues under Subsection (a). The convicting court may grant a motion to postpone the hearing, but not for more than 30 days, and only if the court states, on the record, good cause for delay.

(c) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event that judge, if qualified for assignment under Section 74.054 or 74.055, Government Code, may preside over the hearing.

(d) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(e) The parties shall file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. If the court requests argument of counsel, after argument the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties file proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(f) The clerk of the convicting court shall immediately transmit to:

(1) the court of criminal appeals a copy of:

(A) the application;

(B) the answers and motions filed;

(C) the court reporter’s transcript;

(D) the documentary exhibits introduced into evidence;

(E) the proposed findings of fact and conclusions of law;

(F) the findings of fact and conclusions of law entered by the court;

(G) the sealed materials such as a confidential request for investigative expenses; and

(H) any other matters used by the convicting court in resolving issues of fact; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

(g) The clerk of the convicting court shall forward an exhibit that is not documentary to the court of criminal appeals on request of the court.

Sec. 10. Rules of Evidence

The Texas Rules of Criminal Evidence apply to a hearing held under this article.

Sec. 11. Review by Court of Criminal Appeals

The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify.

Credits

Added by Acts 1995, 74th Leg., ch. 319, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 1336, §§ 1 to 5, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 803, §§ 1 to 10, eff. Sept. 1, 1999; Acts 2003, 78th Leg., ch. 315, §§ 1 to 3, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 787, § 13, eff. Sept. 1, 2005; Acts 2005, 79th Leg., ch. 965, § 5, eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 593, § 3.06, eff. Sept. 1, 2007; Acts 2009, 81st Leg., ch. 781, §§ 2 to 5, eff. Sept. 1, 2009; Acts 2009, 81st Leg., ch. 781, § 11, eff. Jan. 1, 2010; Acts 2011, 82nd Leg., ch. 1139 (H.B. 1646), § 1, eff. Sept. 1, 2011; Acts 2013,

83rd Leg., ch. 78 (S.B. 354), § 2, eff. May 18, 2013; Acts 2015, 84th Leg., ch. 1215 (S.B. 1743), §§ 1 to 5, eff. Sept. 1, 2015.

Notes of Decisions (202)

Footnotes

[1] V.T.C.A., Government Code § 78.051 et seq.

Vernon's Ann. Texas C. C. P. Art. 11.071, TX CRIM PRO Art. 11.071
Current through legislation effective June 4, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.