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AUSTIN, TEXAS 78711

11/17/2021

Tr. Ct. No. 941903-A
MCCLAIN, GARY CHRISTOPER WR-91,298-01

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

Deana Williamson, Clerk

GARY CHRISTOPER MCCLAIN
WYNNE UNIT - TDC # 1218067
810 FM 2821
HUNTSVILLE, TX 77349

NO. 941903-A

EX PARTE	§	IN THE 178TH DISTRICT
	§	COURT OF
GARY MCCLAIN, Applicant	§	HARRIS COUNTY. TEXAS

STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AFTER DEPOSITIONS

(Filed Mar. 1, 2020)

The Court has considered the application for writ of habeas corpus (including exhibits), the State's answer, the State's submitted exhibits, the affidavit of Christopher Downey, all deposition testimony taken December 17, 2019, and official trial court records in the above-captioned cause. The Court finds that there are no controverted, previously unresolved facts material to the legality of the applicant's confinement which require an evidentiary hearing and recommends that the instant habeas application, cause number 941903-A, be DENIED based on the following:

Findings of Fact and Conclusions of Law

1. Applicant is confined pursuant to the judgment and sentence of the 178th District Court of Harris County, Texas, in cause number 941903 (the primary case), where Applicant was convicted pursuant to a jury verdict for the felony offense of murder.

2. A jury assessed punishment at ninety-nine (99) years confinement in the Texas Department of Criminal Justice – Correctional Institutions Division.

3. The Fourteenth Court of Appeals affirmed the trial court's judgment. *McClain v State*, No. 14-04-00114-CR (Tex. App.—Houston [14th. Dist.] August 25, 2005. pet ref d.) (mem' op. not designated for publication).

4. A mandate was issued March 15, 2006, finalizing Applicant's conviction.

5. Applicant filed the instant habeas application on July 24, 2017, approximately eleven (11) years after the conviction in his case became final.

6. Applicant's first and second grounds for relief allege ineffective assistance of trial counsel based on failure to object, impeach a witness, properly advise Applicant of his options, prepare Applicant and witnesses for trial, and call punishment witnesses. *Applicant's Writ at 6-9.*

7. Applicant's trial counsel, Christopher Downey, (hereinafter referred to as "Downey") was ordered to file an affidavit addressing Applicant's claims.

8. Downey filed an affidavit pursuant to the court's order on February 6, 2018. *See Affidavit of Christopher Downey.*

9. The court finds the affidavit of Christopher Downey to be credible.

10 The court ordered the parties to conduct depositions of witnesses relevant to the habeas proceeding.

11. Depositions were conducted on December 17, 2019[1].

12. The court finds the deposition testimony of Christopher Downey to be credible.

Facts of the Case

13. Applicant dated Helen Kirklin for approximately a year and half (V R.R. 57).

14. Helen Kirklin was a 22-year-old mother of three young children: six-year-old Roneshia, five-year-old Javari, and three-year-old Joe'na (IV R.R. 16).

15. Kirklin had been attempting to end her relationship with Applicant for two months before she was killed (IV R.R. 18, 23) (V R.R. 12-13).

16. A few weeks before Kirklin's murder, Applicant called Kirklin's new boyfriend, Jeffery Van Rowe, several times and then came down to Rowe's cell phone store to confront him (V R.R. 10 12, 16-17, 123).

17. Applicant told Rowe over the phone that he was on his way to Rowe's store to kill him and his mother (V R.R. 18).

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[1] The depositions are contained within a single volume and will be cited with the name of the party being deposed, and the page number of the transcript as a whole.

18. Applicant called Rowe approximately ten times within twenty minutes to repeatedly threaten him (V R.R. 18-19).

19. Applicant arrived at the store and had a confrontation with Rowe, where Applicant attempted to strike Rowe (V R.R. 16, 18).

20. Applicant left the store, called Rowe again and told Rowe that Rowe should have killed him while he had the chance because now Applicant would kill him (V R.R. 18).

21. Applicant returned to the store fifteen minutes later to apologize, saying that he was taking his hostility out on the wrong person, he should be angry at Kirlain (V R.R. 19).

22. Applicant explained to Rowe that he just gets angry sometimes (V R.R. 20).

23. Applicant stated that there "is going to be a time where he's going to kill [Kirklain]." (V R.R. 19-20).

24. Rowe did not see Applicant again until the day of the murder (V. R.R. 21).

25. On March 9, 2003, Applicant dropped Kirklin off at church: she was going to get a ride back home with her cousin, Charlotte Johnson (IV R.R. 14-15, 18, 24-25). Johnson was at the church with her two small children. Tyris and Kar'Veh, while Kirklin was there with her daughter Joe'na (IV R.R. 13, 26-27).

26. Around 1:30 p.m., near the end of the church service, Applicant showed up back inside the church and repeatedly asked Kirklin to

accompany him to the pastor's office for counseling; however, she kept refusing (IV R.R. 20-21, 24).

27. Eventually, Kirklin agreed (IV R.R. 24). Applicant and Kirklin were inside the pastor's office for forty-five minutes, and their voices were very loud and angry (IV R.R. 25). When they were finished, Johnson brought her children out to the car to get ready to leave, although Applicant and Kirklin continued to talk (IV R.R. 26-28).

28. Kirklin eventually got into Johnson's car and started saying she was frustrated with Applicant (IV R.R. 29).

29. Johnson drove Kirklin back to her apartment at 4002 Corder Street, and they arrived at approximately 3:30 p.m. (IV R.R. 29, 32).

30. Johnson pulled into a parking spot near Kirklin's apartment: unit and they all went inside (IV R.R. 31, 33).

31. Kirklin made plans on the telephone to go to her sister Marquetta s house in South Park while Johnson's boys played a video game (IV R.R. 33, 41).

32. The group in Kirklin's apartment then walked back out to Johnson's car (IV R.R. 34).

33. As Kirklin was helping Joe'na get into the back seat, Applicant drove up (IV R.R. 34-36).

34. Kirklin also spoke with Rowe over the phone, who told her that he saw Applicant driving by and warned her to "expect company." (V R.R. 24-25).

35. Rowe was worried and told Kirklin to stay on the phone with him (V R.R 25).

36. Kirklin kept Rowe on the phone and Rowe could hear Applicant's voice on the other end (V R.R. 25-27).

37 Meanwhile, Johnson decided to change clothes, so she took her keys back inside the apartment and left Kirklin to talk with Applicant with the three children still in the back seat of her car (IV R.R. 37.39).

38. Kirklin and Applicant argued; she was telling him, "Leave MC alone," and "I don't want to be with you anymore." (IV R.R. 70-71, 77, 83-85).

39. Kirklin told Applicant there "is no us." (V R.R. 25).

40. The two continued to argue and Applicant told Kirklin he wanted her back and would buy her whatever she wanted and Kirklin responded that she didn't want anything from him anymore (V. R.R. 26).

41. Applicant asked Kirklin if she was going to continue her friendship with Rowe and Kirklin said yes (V R.R. 26).

42. Applicant responded, "I don't care . . . if I can't have you, can't nobody else have you." (IV R.R. 85).

43. Applicant went to the trunk of his car and retrieved a silver handgun ([V R.R. 70-71 77, 83, 85-86).

44. Kirklin was saying, "Can you stop. Gary? Chill out, go home." (IV R.R. 87-89). Rowe heard Kirklin tell Applicant that he was about to do something stupid, and then the phone went dead (V R.R. 28).

45. Applicant walked back over to the passenger side of Johnson's car and shot Kirklin four times at point-blank range (IV R.R. 73, 77, 88-89, 115).

46. The three children witnessed the murder from the backseat of the car (IV R.R. 236).

47. Applicant then ran to his car, threw the gun in his trunk, and sped away from the apartment complex (IV R.R. 84, 90, 94-95, 116, 121).

48. Kirklin was gasping for air and was unable to talk (IV R.R. 89-90).

49. A few minutes later, Applicant called Rowe (V R.R. 28-29). Applicant told Rowe that Kirklin had chosen him and that "you're a better man than me, you can have her." (V R.R. 29). Applicant then hung up the phone (V R.R. 29).

50. Applicant called back ten minutes later, which further alarmed Rowe because Kirklin had not yet called to explain her dead phone (V R.R. 29).

51. Eventually, someone from Kirklin's apartment complex came to the store to inform Rowe that Applicant had murdered Kirklin (V R.R. 30).

52. Fearing for his life, Rowe immediately closed the store and took his younger cousin, who was working at the store, to a safer location (V R.R. 30).

53. The three children who had witnessed the murder from the rear seat of the car ran back into Kirklin's apartment and told Johnson, "Mama, [Kirklin] has been killed." (IV R.R. 39).

54. Johnson thought it was a joke., however, when she walked out into the parking lot, she saw a crowd of 15 to 20 people standing around her car (IV R.R. 39-40, 118).

55. Johnson told the crowd to call 911 and someone already had called (IV R.R. 41, 76, 117).

56. Johnson then called Marquette and started shouting, "he had shot her, he had shot her, [Applicant] had shot [Kirklin]." (IV R.R. 41).

57. The ambulance took Kirklin to a hospital and she was pronounced dead when she arrived (IV R.R. 119, 140-141). Stippling on the four gunshot wounds indicated that she had been shot at close range, and the size of the holes suggested a large caliber weapon (IV R.R. 141-143). The bullets were all .44 caliber hollow-point (IV R.R. 153, 190).

58. One fatal bullet penetrated the center of her lower neck, cutting through some of the major blood vessels to her head, and piercing her right lung (IV R.R. 186-187).

59. A second fatal bullet burst though the center of her sternum, breaking several ribs and again injuring her right lung (IV R.R. 192-194).

60. A third bullet went completely through her left forearm (IV R.R. 196),

61. The fourth bullet went through Kirklin's left thigh, breaking a bone and damaging the major blood vessels to that leg (IV R.R. 199-200).

62. Russell Hayes with the Houston Police Department Homicide Division, was dispatched to the scene of the murder (IV R.R. 131).

63. There were two torn-up pictures nearby: one of Applicant and Kirklin together, and another of Kirklin alone (IV R.R. 137) (V R.R. 5).

64. Hayes spoke with the witnesses at the scene, including the three small children that were inside the car, and discovered that Applicant was the main suspect (IV R.R. 133, 145). Hayes unsuccessfully attempted to locate Applicant at his listed address as well as at his employer's address (IV R.R. 145-146).

65. Applicant was supposed to pick up his daughter, Kerria, at the babysitter at approximately 6:30 p.m. that evening (IV R.R. 222). He called once to say that he was on his way, but the babysitter told him to take his time because she still had to feed Kerria (IV R.R. 223).

66. Applicant called back later and said that he would not be able to pick up his daughter because he "had done something really, really bad." (IV R.R. 223). Applicant sounded shaky and nervous (IV R.R. 224).

67. Applicant gave the babysitter some numbers to call and then told her to call CPS (IV R.R. 225).

68. Applicant told her not to call him back on his cell phone because he was hiding out (IV R.R. 225).

69. The babysitter, who was also watching Kirklin's daughter Roneshia, eventually learned what had happened from Kirklin's father (IV R.R. 226).

70. Sandra Harris was a friend of Applicant's family who lived in Oak Hurst. Texas, near Huntsville (IV R.R. 230, 232). Sometime after the murder. Applicant's sister called Harris and asked her if Applicant could stay with her for a while because he had gotten into some trouble (IV R.R. 232-233).

71. Harris did not learn the details of the trouble and was surprised at the request but was willing to help (IV R.R. 233).

72. Applicant had been staying with Harris for four or five days when Harris saw a picture of the Applicant in a newspaper (IV R.R. 234).

73. Applicant was wanted for murdering a young woman, so Harris asked him about it and then asked him to leave (IV R.R. 234).

74. Applicant told her than he got in an argument with Kirklin, then went back to his house, got a gun, and returned to shoot her (IV R.R. 235).

75. Harris told Applicant not to use that story because it was "premeditated." (IV R.R. 235).

76. Applicant said that he shot three times with three children sitting in the back seat of the car

because Kirklin would not stop talking to another man (IV R.R. 235-236).

77. Harris was crying, but Applicant did not appear to be showing any remorse during the story (IV R.R. 237).

78. Harris called Applicant's sister and told her to come and get Applicant: however, Applicant's family did not collect him for another three days (IV R.R. 237).

79. Applicant's family did not pick him up until after they posted bond on the pending murder charge (IV R.R. 150, 237) (V R.R. 146).

80. Applicant told Harris that he was going to flee if he was convicted and that he was not going to serve any time because he would claim that it was a crime of passion (IV R.R. 240).

81. On April 16, after thinking about her situation for a number of days, Harris called Detective Hayes and told him what Applicant had said to her (IV R.R. 149-150, 238-240).

82. At trial, Applicant admitted to shooting Kirklin with a chrome .44 caliber revolver and then leaving the gun in his open car to be stolen (V R.R. 104, 111-112).

83. Applicant testified that Kirklin manipulated him and took advantage of him and stated that "sometimes people back you up in a corner and make you do things you would never expect you would ever do." (V R.R. 109).

84. Applicant also claimed that he repeatedly tried to break up with Kirklin but that she would not let go of him (V RR125-126, 131).

85. Applicant admitted that he had prior convictions for assaulting a woman and for indecent exposure (V R.R. 149).

Equitable Doctrine of Ladies

86. Applicant provides no suitable explanation for the unreasonable delay in filing his habeas application.

87. Applicant presented information to the court that he retained Clyde Williams as habeas counsel on August 21, 2007. *See State's Writ Exhibit B Letters from Clyde Williams at 1.*

88. Williams prepared a draft writ for Applicant, but was instructed not to file the writ (Williams Dep**.** Ill); *see State's Writ Exhibit B Letters from Clyde Williams at 2.*

89. The writ prepared by Williams alleged ineffective assistance of counsel on seven points, including failure to interview and present punishment witnesses. specifically: Patrick McClain, Karen Fletcher, Jewel Terrell, Benson Terrell, Theron Vallery, Vera Lewis, and Elaine Jones; prosecutorial misconduct for improper argument and a violation of a motion in limine; and ineffective assistance of appellate counsel. *See State's Writ Exhibit A Draft of Clyde Williams' Writ.*

90. Williams cannot recall precisely why she was told not to file the writ, but recalls a great deal

of tension between herself and Applicant (Williams Dep. 111).

91. Williams recalls that Applicant was not satisfied with the grounds for relief that Williams believed were viable for presentation to the court (Williams Dep. 111).

92. Williams' representation of Applicant was terminated, and Applicant's current habeas attorneys, Nancy Barohn and Michael Gross, were retained in approximately September of 2010. *See State Writ Exhibit E September 14, 2010 Letter from Nancy B. Barohn.*

93. Applicant's current habeas attorneys did not file a writ until nearly seven years later on July 24, 2017.

94. Applicant's current habeas attorneys have not provided any reasonable explanation for the seven year delay.

95. Applicant's instant writ has substantially similar grounds as the draft writ prepared by Williams.

96. The affidavits supplied by Applicant are all dated between January and June of 2017.

97. Applicant did not have his case reviewed by his purported expert until shortly before the writ was filed (Lynch Dep. 92).

98. Applicant did not make a request for Downey's file until sometime after the writ was filed in 2017 (Downey Dep. 59-60).

99. Applicant fails to show what diligent actions were being taken that required seven additional years to complete.

100. Applicant's unnecessary delay has prejudiced the State's ability to respond to his claims.

101. Due to the passage of time Downey no longer retains his defense file for the case (Downey Dep. 24-25); *See Affidavit of Christopher Downey at 1.*

102. Documents contained within Downey's defense file would have likely been dispositive for several of Applicant's habeas claims.

103. Applicant's sister, Karen McClain, was provided with a number of original documents from Downey's defense file, including the memo of options (Downey Dep. 60).

104. One of the documents was a "memo to client detailing all options" that would likely have contained information on whether or not Applicant had been informed he could plead guilty and proceed on punishment alone. (Downey Dep. 68) *See State's Writ Exhibit C Letter to Karen McClain.*

105. Karen McClain does not believe she has a copy of this document or any of the others Downey gave to her (McClain Dep. 145).

106. Downey's defense file would likely have contained copies of the documents provided to Karen McClain.

107. Downey's defense file likely would have contained notes about which prospective punishment witnesses he spoke to, what their testimony would

be, and if he believed they would be helpful or harmful witnesses (Downey Dep. 76).

108. Due to the passage of time, Downey no longer recalls certain aspects of his representation of Applicant, and reviewed the documents available to him to help refresh his memory (Downey Dep. 61-62). *See Affidavit of Christopher Downey at 1.*

109. Downey has no independent recollection of decisions made mid-trial, and little recollection of many aspects of his representation of Applicant (Downey Dep. 56-58; 60-62; 64; 66-68).

110. Downey was unable to use available documents to refresh his memory regarding the specifics of many of the decisions that were made during his representation of Applicant (Downey Dep. 61).

111. Applicant's purported expert, Phillip Lynch, stated that he had not seen evidence that Downey had investigated mitigation for Applicant's defense (Lynch Dep. 104). This information would likely have been contained within Downey's defense file.

112. The Court finds the delay by Applicant in filing the instant application for writ of habeas corpus has affected his credibility. *Ex parte Young*, 479 S.W.2d 45 (Tex. Crim. App. 1972) (The credibility of Applicant's claim was prejudiced by an eleven year delay where due to the passage of time the State was unable to rebut Applicants claim with anything other than trial counsel's testimony to the contrary).

113. The facts and circumstances cannot be fully explored because passage of time has left the court with incomplete recollections and a lack of relevant documents.

114. Applicant's unreasonable delay has prejudiced the State's ability to adequately respond to Applicant's instant habeas allegations related to ineffective assistance of counsel, as Downey no longer retains his defense file, cannot recall many aspects of his representation of Applicant, and the defense file likely would have been dispositive of several of Applicants allegations. *Ex parte Perez*, 398 S. W. 3d 206, 215 (Tex. Crim. App. 2013); *See Affidavit of Christopher Downey.*

Alleged Failure to Object

115. Applicant claims Downey failed to properly object to testimony about Applicant's history of gun ownership and trial testimony during guilt/innocence about an incident where Applicant threatened to kill Jeffrey Van Rowe. *Applicant's Writ at 6.*

116. Evidence that is typically inadmissible under Tex. R. Evid. Rule 404(b)(1) may be admissible for other purposes, such as proving motive, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Tex. R. Evid. Rule 404(b)(2).

117. In the instant case, Applicant's propensity to carry a firearm was relevant to rebut sudden passion (V R.R. 66-70).

118. Downey objected to questions about Applicant's history of gun ownership during trial, and was overruled (V R.R. 68).

119. Downey cannot recall if there were any hearings on the admissibility of the extraneous offenses listed in the State's notice (Downey Dep. 38).

120. Downey did not make additional objections to Applicant's gun ownership because it was undisputed that Applicant owned a gun (Downey Dep. 43).

121. Downey's trial strategy did not include objecting to undisputed facts (Downey Dep. 43).

122. Applicant fails to show that further objection by Downey, or an objection at an earlier time would have been successful.

123. Applicant fails to show harm because there was no dispute that Applicant owned a gun and shot Kirklin with a gun.

124. Downey objected multiple times to the incident where Applicant threatened to kill Rowe and then told Rowe he would one day have to kill Kirklin. (V R.R. 16; 18; 21-22).

125. Applicant alleges Downey should have specifically objected to the testimony being a violation of 404(b).

126. Article 38.36 of the Texas Code of Criminal Procedure, which applies in prosecutions for murder, provides in relevant part:

"In all prosecutions for murder, the State or the defendant shall be permitted to offer testimony

as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.36(a)

127. The incident with Rowe was admissible to aid the State in proving the 'intent' element of murder, rebut the presumption of sudden passion, and to show the nature of the relationship between deceased and accused. *Garcia v. State*, 201 S.W.3d 695, 702 (Tex. Crim. App. 2006) (Circumstances surrounding the relationship at the time of a murder may be considered, including evidence that could be categorized as a prior bad act).

128. Further, the incident explains Rowe's fearful frame of mind and actions that took place minutes before the murder. (V R.R. 26-27); *See* TEX. CODE CRIM. PROC. ANN. art. 38.36(a); *see also Garcia* at 702.

129. Due to the passage of time, Downey cannot recall if there were any specific discussions with the trial judge at the bench (Downey Dep 38 39).

130. Due to the passage of time, Downey cannot recall if there were any specific admissibility hearings conducted at the bench regarding the incident with Rowe (Downey Dep 38 – 39).

131. Due to the passage of time, Downey cannot recall why he only objected to admissibility about the incident with Rowe (Downey Dep. 40).

132. Due to the passage of time, Downey cannot recall why he did not request a limiting instruction for the incident with Rowe (Downey Dep. 40-41).

133. Applicant fails to show that continued objections by Downey regarding the incident with Rowe would have been sustained.

134. Counsel is under no obligation to object to admissible evidence, or conduct futile acts. *Holland v. State*, 761 S.W.2d 307, 318-9 (Tex. Crim. App. 1988).

135. Applicant fails to show that the trial judge would have committed error in overruling the proposed objections if they were made. *Vaughn v. State*, 931 S.W2d 564 (Tex. Crim. App, 1996).

136. During the punishment phase of trial, Applicant's gun ownership was brought up in accordance with Texas Criminal Procedure section 37.07; Applicant fails to show that an objection during the questions in the punishment phase would have been successful. (VI R.R. 6-14); (VII R.R. 8-10).

137. Applicant fails to show Downey was deficient for failing to object.

Alleged Failure to Investigate

138. Applicant alleges that Downey failed to investigate witness Sandra Harris and impeach her testimony with her pending felony charge.

139. Applicant's claim that Harris was testifying against him in the hope that she would get a

lenient sentence on her felony charge is unfounded speculation.

140. Harris did not have a felony conviction at the time of her testimony.

141. Harris felony case was in no-arrest status during the time of trial and did not begin in court until May of 2004, four months after Applicant's case was complete. *See Applicant's Exhibit 7*; *Magistrate's admonitions docket sheet.*

142. Harris' felony charge was not in Harris County. *See Applicant's Exhibit 7*: *Magistrate's admonitions & docket sheet.*

143. Pursuant to TX. R. EVID. Rule 609 and TX. R. EVID. Rule 608, the pending warrant would be inadmissible for impeachment purposes.

144. Applicant fails to show that Harris was somehow awaiting sentencing on a case she had yet to be arrested for, and does not indicate how an out of county warrant could have been used for impeachment purposes against Harris.

145. Applicant fails to show that the results of a more in-depth investigation on Harris' warrant for felony driving while intoxicated would have made a difference in the outcome of the case. *Mooney v. State*, 817 S.W.2d 693, 697 (Tex. Crim. App. 1991) (Applicant must establish what, if anything, counsel could have learned from a more thorough investigation)

146. Applicant cannot show Downey was ineffective for failing to impeach Sandra Harris.

Alleged Failure to Present
a Sudden Passion Defense

147. Applicant alleges that Downey failed to present an adequate sudden passion defense.

148. Downey's trial strategy was to use the guilt-innocence phase of trial to introduce the foundational elements of sudden passion through witnesses. *See Affidavit of Christopher Downey* at 3.

149. There is limited opportunity for presentation of sudden passion evidence in guilt-innocence. because sudden passion is an issue for punishment. Tex. Penal Code Ann. § 19.02(d).

150. Much of the sudden passion information that Applicant suggests should have been presented during guilt-innocence, would be objectionable because it is irrelevant to the issue of guilt or innocence (Downey Dep. 70); *see* Tex. R. Evid. Rule 401.

151. Presentation of sudden passion evidence during guilt/innocence would have opened the door for the State to present testimony about Applicant's extraneous offenses.

152. Sandra Harris testified that Applicant's claim of sudden passion was not genuine (IV R.R. 239-240).

153. Applicant told Harris "if I say it was a crime of passion. I can probably get away with it." (IV R.R. 240).

154. Applicant was supposed to testify regarding sudden passion.

155. However, when Applicant testified, he instead told the jury he wasn't going to say murdering Kirklin was wrong (V R.R. 108).

156. Applicant informed the jury that he was backed into a corner and that he had tried every possible way to get away from Kirklin (V R.R. 109).

157. Applicant said he was forced to pull the trigger (V R.R. 111).

158. Applicant fails to show that Downey did not appropriately present a sudden passion defense with the available facts.

Alleged Failure to Present Punishment Witnesses and Mitigation Evidence

159. Applicant alleges that Downey failed to call Patrick McClain, Theron Vallery, and Harold Stanley during the punishment phase of trial, and failed to elicit sufficient mitigation testimony from Applicant, Karen (Sapp) McClain, and Benson Terrell.

160. Downey does not recall which witnesses were available for trial. *See Affidavit of Christopher Downey* at 4.

161. Downey recalls there were a number of persons present to testify on Applicant's behalf. *See Affidavit of Christopher Downey* at 4.

162. Downey presented five punishment witnesses at trial (VI R.R. 50-60, VII R.R. 3-16).

163. Downey's typical trial strategy is to introduce punishment witnesses that advance defensive theories without introducing evidence that may harm the defense's case. *See Affidavit of Christopher Downey* at 4.

164. When Downey received initial discovery on Applicant's case, the file already contained a large number of family violence offense reports where Applicant was involved, including notes on a disturbance Applicant had caused at the Harris County District Attorney's Office – Family Criminal Law Division (Downey Dep. 63-64).

165. The extraneous offense reports include allegations that Applicant:

    a. Fractured the nose of his ex-girlfriend Tiffany Clemons, *State's Writ Exhibit D at 1.*

    b. Struck Tiffany Clemons in the face: *State's Writ Exhibit D at 5, 14*

    c. Choked Tiffany Clemons; *State's Writ Exhibit D at 18.*

    d. Pointed a handgun at Tiffany Clemons and threatened to kill her: *State's Writ Exhibit D at 9*.

    e. Posed as a police officer and sexually assaulted Alicia Williams at knife point; *State's Writ Exhibit D at 25.*

    f. Broke into Bridgette Mays apartment and threatened her with a firearm, *State's Writ Exhibit D at 47.*

g. Exposed his penis to an adult bookstore clerk and offered to pay her to watch him masturbate. *State's Writ Exhibit D at 40.*

166. The extraneous notice provided by the State include allegations that Applicant:

a. Threatened Kirklin with a firearm (C.R. 81);

b. Threatened Sunny. Cox with a firearm (C.R. 81);

c. Sexually assaulted Rhodesia Atkins (C.R. 81);

d. Threatened Rhodesia Atkins with a firearm (C.R. 81):

e. Struck Rhodesia Atkins on multiple occasions (C.R. 81).

167. Downey's trial strategy in the instant case was to prevent the jury from hearing about Applicant's extraneous offenses. *See Affidavit of Christopher Downey at 3-4.*

168. Downey recalls locating Applicant's pastor, who spoke with Applicant and Kirklin shortly before her murder, and determined he would not be a valuable witness during the punishment phase (Downey Dep. 74-75); *see Affidavit of Christopher Downey at 4.*

169. The affidavits of Stanley Harold, Karen McClain, Patrick McClain, and Theron Valley indicate they all would have testified to Applicant's peaceful, loving or good nature, opening the door for the State to cross-examine them on

Applicant's history of violent conduct in his romantic relationships, in direct contradiction to Downey's strategy. *See Affidavits of Stanley Harold, Karen McClain, Patrick McClain and Theron Valley*.

170. The contents of the offense reports could have been used by the State for cross-examination of Applicant's character witnesses, if they had testified to Applicant's peaceful nature or loving personality.

171. Downey recalls that the State was having difficulty ensuring the presence of witnesses to testify about the extraneous offenses (Downey Dep. 72).

172. Downey believed without the witnesses, he could keep the majority of the extraneous offenses from the jury with a limited direct of the punishment witnesses (Downey Dep. 72).

173. Downey was successful in barring admission of many of the extraneous offenses (Downey Dep. 72).

174. Opening the door to testimony about the extraneous offenses would have been damaging to Applicant's punishment strategy.

175. Opening the door to testimony about the extraneous offenses would have negated any positive benefits of additional character testimony.

176. Applicant fails to show that Downey's strategic decision to prevent opening the door to Applicant's history of violence was defective performance.

Applicant's Affidavit and Trial Testimony

177. Applicant's habeas affidavit contains information that was never conveyed to Downey (Downey Dep. 55).

178. Applicant did not provide a deposition.

179. Applicant testified in guilt/innocence rather than in punishment to prevent the State from cross-examining him on the extraneous offenses (Downey Dep. 36).

180. Prior to trial, Downey discussed Applicant's trial testimony with him and practiced the questions Downey would ask (Downey Dep. 34).

181. Downey did not ask Applicant additional questions during his trial testimony because Downey believed Applicant's mood was unstable and aggressive and he did not want to risk opening the door to cross examination on the extraneous offenses (Downey Dep. 35).

182. Downey did not call Applicant to testify during punishment because he believed the trial judge would allow the State to cross-examine him about the majority of the prior offense reports where Applicant exhibited violent behavior (Downey Dep. 52),

183. Downey believed cross-examination on the offense reports would further damage to Applicant's sudden passion defense (Downey Dep. 52).

184. Applicant fails to demonstrate that Downey did not adequately prepare Applicant for his testimony.

185. Applicant fails to show that Downey did not have a reasonable strategy for his decisions regarding Applicant's testimony.

186. Applicant fails to demonstrate that Downey was ineffective for not calling him as a witness during punishment.

Theron Vallery

187. Downey recalls that he interviewed Theron Vallery and determined that Vallery would not be a good punishment witness (Downey Dep. 56-57).

188. Downey cannot recall why he believed Vallery would not be a suitable witness (Downey Dep 57).

189. Vallery's habeas affidavit contains sentiments that were never expressed to Downey (Downey Dep. 56).

190. Downey believes his file would have contained notes about what information Vallery provided (Downey Dep. 77).

191. Vallery asserts that he does not think Downey ever spoke with him about his testimony (Vallery Dep. 160).

192. Vallery recalls meeting with Downey with a group of persons, but due to the passage of time cannot recall specifics of what he and Downey discussed (Vallery Dep. 165-166).

193. Vallery believes he went to Downey's office with Applicant on another occasion, but cannot recall any specifics (Vallery Dep. 166).

194. Vallery's affidavit asserts "not a day went by where [he and Applicant] were not in touch with each other." *See Affidavit of Theron Vallery.* However, Vallery testifies that he and Applicant were not in contact daily (Vallery Dep. 166).

195. Vallery asserts that he and Applicant are like brothers, but was unaware Applicant had been in trouble before, and was unaware Applicant had a troubled history with his previous girlfriends (Vallery Dep. 166-167).

196. Vallery's proposed testimony that Applicant was never violent would have opened the door to cross-examination about the extraneous offenses.

197. Applicant fails to show that Vallery's testimony would have been beneficial and not opened the door to the extraneous violent offenses Downey sought to keep out.

198. Applicant fails to show Downey was deficient for not presenting Vallery as a punishment witness.

Stanley Harold

199. Stanley Harold did not provide a deposition.

200. Downey does not know if he was aware of Stanley Harold as a potential witness (Downey Dep. 58-59).

201. Downey believes his file would have contained notes indicating if Harold was ever mentioned to him as a potential witness (Downey Dep. 77).

202. Harold's proposed testimony would have been based upon what Applicant told him about the relationship with Kirklin, not from any first-hand experience.

203. Harold's proposed testimony that Applicant was troubled' over his relationship with Kirklin in the weeks before the shooting would not have been beneficial to Applicant's sudden passion defense.

204. Harold's proposed testimony that he believed Applicant was a good person who always looked out for others would have opened the door to cross-examination on the extraneous offenses.

205. Applicant fails to show that Harold's testimony would have been beneficial and not opened the door to testimony regarding the extraneous violent offenses Downey prevented the jury from hearing.

206. Applicant fails to show that Downey was ineffective for not calling Harold as a punishment witness.

Benson Terrell

207. Benson Terrell did not provide a deposition.

208. Downey does not recall all the specifics of his conversation with Benson Terrell. *See Affidavit of Christopher Downey* at 4.

209. Benson Terrell's habeas affidavit contains information that was never conveyed to Downey (Downey Dep. 76).

210. Downey believes he was thorough in discussing the potential testimony Terrell had to offer. (Downey Dep. 76).

211. Downey believes his file would have contained notes about what information Terrell provided (Downey Dep. 77).

212. Terrell's proposed testimony that Applicant was a good person and "not a monster" as portrayed at trial would have opened the door to cross-examination on Applicant's extraneous offenses.

213. Terrell's testimony during punishment covered many of the statements in his affidavit.

214. Terrell testified that he and Applicant met approximately twenty-five years prior and were close friends, socializing two or three times a week (VI R.R. 50-51).

215. Terrell testified that Applicant's relationship with Kirklin was one-sided and Applicant had strong feelings for Kirklin (VI R.R. 52-53).

216. Terrell testified that he counseled Applicant to end the relationship with Kirklin (VI R.R. 53).

217. Applicant fails to show that slightly different testimony from Terrell would have made a difference in the outcome of the case.

218. Applicant fails to show that Downey conducted an ineffective direct of Terrell.

Karen McClain

219. Downey believes the habeas affidavit of Karen McClain contained inaccurate statements (Downey Dep. 53-54).

220. Karen McClain did not write her affidavit (K. McClain Dep. 141).

221. Karen McClain's affidavit and her statements during the deposition are conflicting.

222. Karen McClain's affidavit asserted that Downey never spoke to her about Applicant's case. See *Affidavit of Karen McClain.*

223. Downey recalls speaking with Karen McClain about the case on multiple occasions (Downey Dep. 62, 75).

224. Karen McClain recalls speaking to Downey about the case, but due to the passage of time. cannot recall specifically what was discussed during any conversation with Downey, for the entirety of his representation of Applicant (K. McClain Dep 141-142).

225. Karen McClain recalls speaking to Downey the day she testified, but cannot recall what Downey said to her, or what she said to him (K. McClain Dep 143-144).

226. Karen McClain's affidavit includes specific information about several conversations where Downey was speaking to Applicant about his plea options. *See Affidavit of Karen McClain at 3.*

227. The court finds that Karen McClain's testimony that she cannot recall the specific conversations she had with Downey regarding the case is credible.

228. The court finds that Karen McClain's statement that Downey never spoke to her about the case or her testimony is not credible.

229. Karen McClain's affidavit asserted that she didn't know what questions to expect on cross-examination from the State. *See Affidavit of Karen McClain.*

230. At trial, the State did not cross-examine Karen McClain (VII R.R. 15)

231. Karen McClain did not recall that she had not been cross-examined by the State (K. McClain Dep. 145-146).

232. Karen McClain attempted to convince Applicant to plead to the 25 year offer-from the State (K. McClain Dep. 144).

233. Karen McClain's affidavit asserts that an investigator was never hired onto the case. *See affidavit of Karen McClain.*

234. However, Patrick McClain's affidavit asserts that he and Karen were introduced to an investigator. *See affidavit of Patrick McClain.*

235. Karen McClain never asked Downey if he had hired an investigator (K. McClain Dep. 146).

236. Karen McClain's affidavit asserts that she believed Downey was working diligently on the case. *See affidavit of Karen McClain.*

237. However, she is unable to recall any specific conversations with Downey that made her feel that way about the case (K. McClain Dep. 146-147).

238. Karen McClain's statement that she knows Downey did not speak to her about her testimony is unpersuasive.

239. Karen McClain does not recall getting documents from Downey at the conclusion of Downey's representation of Applicant (K. McClain Dep. 145-146).

240. Karen McClain does not possess the documents Downey turned over to her (K. McClain Dep. 145-146).

241. The letter from Downey detailing everything he was turning over to Karen includes several medals and good merit certificates from Applicant's time in the military. *See State's Writ Exhibit C.*

242. Karen McClain is familiar with Applicant's prior romantic relationship with Tiffany Clemons, and is aware that they had a tumultuous relationship (K. McClain Dep 148-149).

243. Karen McClain is familiar with Applicant's prior romantic relationship with Rhodesia Atkins (K. McClain Dep. 149).

244. Karen McClain believes it would not have been helpful for the jury to hear about Applicant's violent history with his prior girlfriends (K. McClain Dep. 153).

245. Karen McClain recalls hiring Clyde Williams to work on Applicant's habeas petition (K. McClain Dep. 153-155).

246. Karen McClain recalls speaking with Williams, but due to the passage of time, cannot recall specifics of any conversation with Williams (K. McClain Dep. 155).

247. Karen McClain cannot recall instructing Williams to not file the writ that was prepared (K. McClain Dep. 154).

248. Karen McClain recalls that she believed Williams was not doing her job correctly, but cannot recall what caused her to have that belief (K. McClain Dep 154-155).

249. Karen McClain cannot recall why she thought the writ Williams prepared was insufficient (K. McClain Dep. 155).

250. Karen McClain's deposition testimony as a whole indicates she has very little recollection of what actually transpired during Applicant's trial case.

251. The court finds that Karen McClain's affidavit and deposition testimony are insufficient to establish that Downey was ineffective.

252. Karen McClain's proposed testimony detailing Applicant suffering childhood abuse would not have furthered Applicant's sudden passion defense.

253. Applicant fails to show how Karen McClain's proposed testimony that Applicant had past failed relationships would have aided his defense.

254. Karen McClain's proposed testimony about Rhodesia Atkins would have opened the door to the

extraneous violent offenses where Atkins was the complainant.

255. Karen McClain's proposed testimony that the jury assess Applicants sentence in light of his life as a whole would have opened the door to cross-examination about Applicant's prior extraneous offenses.

Patrick McClain

256. Patrick McClain did not provide a deposition.

257. Patrick McClain's affidavit alleges that Downey did not speak to him about Applicant's case or his testimony. *See Affidavit of Patrick McClain at 3-4.*

258. Patrick McClain's affidavit asserts that after hiring Downey, Applicant handled the case with Downey and he was not kept apprised of what their discussions were or the development of a defensive strategy. *See Affidavit of Patrick McClain at 3.*

259. Downey recalls speaking with Patrick McClain on multiple occasions about Applicant's case (Downey Dep. 75).

260. Patrick McClain asserts that had he and Karen McClain known about the potential to plead guilty and proceed only on punishment they would have recommended it to Applicant and he would have taken their advice. *See Affidavit of Patrick McClain at 4.*

261. However, Applicant's siblings strongly recommended he take the State's plea bargain and

Applicant fought them on the topic and said he wasn't going to take the offer (V R.R. 67).

262. Patrick McClain's proposed testimony about Applicant's prior girlfriends would have opened the door to the extraneous incidents of violence against his prior girlfriends, in direct conflict with Downey's trial strategy.

263. Patrick McClain's proposed testimony that Applicant always tried to make his relationships work would have opened the door to Applicant's extraneous offenses.

264. Patrick McClain's proposed testimony that Applicant was not cold-hearted and was always generous would have opened the door to Applicant's extraneous offenses.

265. Applicant fails to show that Patrick McClain's proposed testimony would have been beneficial to his defense.

266. The court finds that Patrick McClain's affidavit is insufficient to show that Downey was ineffective.

267. Applicant insinuates that because Downey did not detail his progress on the case to his family members, Downey was not working diligently on Applicant's case.

268. Applicant fails to show that his family members ever inquired into the status of the case.

269. Applicant fails to show that Downey was under any obligation to discuss the facts of Applicant's case and the potential defense with his family members.

270. Applicant fails to show that the claims made by his family members that Downey did not discuss his work on the case are relevant to his claim of ineffective assistance of counsel.

271. Downey's standard practice when preparing witnesses to testify is to discuss a prospective witnesses' knowledge of facts, role as a witness, and procedure during testimony before calling the person to the stand to testify. Downey has no reason to believe he would have deviated from that standard practice in this case with any of the prospective witnesses. *See Affidavit of Christopher Downey at 4.*

272. Downey's alleged failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and Applicant would benefit from their testimony. *Hunnicutt v. State*, 531 S.W.2d 618 (Tex. Crim. App. 1976).

273. Applicant fails to show that the testimony of his prospective witnesses would have been beneficial to his defense.

274. Applicant fails to show that Downey was ineffective for failing to call Theron Vallery and Stanley Harold.

275. Applicant fails to show that eliciting additional testimony from Patrick McClain, Karen McClain. and Benson Terrell would have been beneficial to his defense.

276. Applicant fails to show that Downey was ineffective for failing to elicit additional testimony

from Patrick McClain, Karen McClain, and Benson Terrell.

Opening and Closing Statements

277. Downey does not recall describing opening statement as a "waste of time" and cannot recall ever describing opening statement as a "waste of time". *See Affidavit of Christopher Downey at 2.*

278. Downey could not give an opening statement to roadmap Applicant's sudden passion defense for the jury because Downey was unsure how Applicant would ultimately testify (Downey Dep. 45).

279. Downey could not inform the jury that Applicant would admit guilt during guilt/innocence because Applicant insisted on pleading not guilty (Downey Dep. 28, 45).

280. Downey was uncertain if Applicant would admit or deny guilt in his testimony (Downey Dep. 28 45).

281. Applicant was combative during the pendency of his case, and often disagreed with Downey's advice (Downey Dep. 45).

282. Downey's strategy was to maintain flexibility due to the uncertainty of Applicant's testimony (Downey Dep. 70).

283. Downey believed that it would be detrimental to Applicant's defense to have Applicant plead not guilty, then tell the jury in an opening statement Applicant was going to testify he was guilty (Downey Dep. 69).

284. Downey could not argue sudden passion in closing for guilt/innocence because it is not relevant. (Downey Dep. 70); Tex. Penal Code Ann. § 19.02(d).

285. Sudden passion is specifically an issue for punishment. Tex. Penal Code Ann. 19.02(d).

286. Downey's opening statement could have potentially opened the door to additional rebuttal evidence during guilt/innocence, in direct conflict with Downey's trial strategy.

287. If the door to the extraneous offenses were opened, rather than being simply inadmissible, the court's ruling to allow rebuttal testimony during guilt/innocence would be judged on whether or not it was within the zone of reasonable disagreement. *Bass v. State*, 270 S.W.3d 557. 563 (Tex. Crim. App. 2008)

288. If Downey believed punishment evidence may be objected to and sustained during guilt/innocence, crafting an opening statement that would be objectionable would be a futile effort. *St. Pe v. State*, 495 S.W.2d 224, 225 (Tex. Crim. App. 1973) (The court was not in error in refusing to let trial counsel outline a punishment defense in his opening for guilt/innocence).

289. Downey could not admit guilt for his client during opening statement in opposition to Applicant's desire to plead not guilty, when Downey was unsure at the time if Applicant would eventually admit guilt to the jury. *See Turner v. State*, 570 S.W.3d 250, 276 (Tex. Crim. App. 2018), reh'g denied (Apr. 17, 2019) (Defense counsel is

prohibited from admitting a defendant's guilt over his objection).

290. After Applicant testified that he was guilty, Downey was under no restriction to avoid discussing Applicant's guilt with the jury.

291. Applicant fails to show that Downey's lack of opening statement was deficient performance and not the product of reasonable strategy.

292. Applicant fails to show that Downey's decision to argue in his punishment closing that the jury find that Applicant acted in sudden passion, rather than for a lenient sentence was deficient.

293. Applicant fails to show a different opening statement would have made a difference in the outcome of his case.

294. Applicant fails to show a different closing statement would have made a difference in the outcome of his case.

Failure to Advise Applicant

295. Applicant was a difficult client and was very opinionated about how he wanted his case resolved (Downey Dep. 64).

296. Applicant did not express that he preferred to plead guilty and proceed only on punishment; Applicant's chief concern was resolving the case with a punishment he found favorable. *See Affidavit of Christopher Downey at 2.*

297. Applicant was only willing to plead guilty if his maximum sentence was eight years. The State

did not offer eight years or less. (Downey Dep. 67-68); *see Affidavit of Christopher Downey at 2.*

298. Applicant was insistent that the case be resolved on his terms (Downey Dep. 30).

299. Downey believes the lowest offer the State ever agreed to was twenty-five (25) years (Downey Dep. 67).

300. Applicant's reasons for sudden passion were inconsistent (Downey Dep. 29, 65).

301. Applicant alleged part of the reason for his reaction was that Kirklin had hit his daughter, but after interviewing Applicant's daughter, Downey believed this story was fabricated (Downey Dep. 65-66); *see State's Writ Exhibit at 3-4.*

302. Downey discussed all potential options with Applicant regarding resolution of the case, including the possibility of pleading guilty and only proceeding on punishment (Downey Dep. 26-30, 74); *see Affidavit of Christopher Downey at 1-2.*

303. Downey advised Applicant of the potential benefits of pleading guilty and proceeding solely on punishment, but Applicant did not wish to do so in this case. *See Affidavit of Christopher Downey at 2.*

304. Downey had many discussions with Applicant in attempt to help Applicant understand that the case was more about sentencing than guilt/innocence (Downey Dep. 30).

305. Downey discussed the potential options at length with Applicant and what his strategy

might be if he wished to plead not guilty (Downey Dep. 29).

306. Downey advised Applicant of the concerns he had with Applicant's desire to proceed to trial rather than plead guilty and proceed on the State's offers of either a plea of forty (40) years or a punishment hearing with a fifty (50) year cap. *See Affidavit of Christopher Downey at 4.*

307. Downey spoke with Applicant about the nuances of a sudden passion defense and the effect the defense would have on punishment proceedings. See *Affidavit of Christopher Downey at 2-3.*

308. Downey discussed with Applicant the procedure for Applicant to testify on direct examination (Downey Dep. 64); *see Affidavit of Christopher Downey at* 3.

309. Downey discussed with Applicant the State's right to cross-examine Applicant, including how best to approach expressing frustration and confusion at certain questions. *See Affidavit of Christopher Downey at 3*.

310. Applicant's responses on direct examination are not indicative of poor preparation on Downey's pail.

311. Downey's decision to have Applicant testify during guilt/innocence but not during punishment was a strategic decision to limit the State's available topics for cross examination. *See Affidavit of Christopher Downey at 3-4.*

312. Had Applicant testified during the punishment phase, he would have been subjected to cross-examination regarding a number of extraneous incidents of violence towards women. *See Affidavit of Christopher Downey at 3-4.*

313. The court finds that Downey appropriately advised Applicant of his right to plead guilty and present a punishment case to a jury.

314. The court finds that Applicant voluntarily chose to reject Downey's advice.

315. The court finds that Applicant cannot show that Downey was deficient for failing to advise him of his options for case resolution.

Phillip Lynch

316. Applicant presented deposition testimony from Phillip Lynch as expert testimony regarding Downey's performance.

317. Lynch was not present for any of the proceedings in the original case (Lynch Dep. 92-93).

318. This deposition was Lynch's first time testifying as an expert (Lynch Dep. 79).

319. Lynch is a personal friend of Nancy Barohn (Lynch Dep. 92).

320. Lynch's opinion is biased and not based upon a thorough investigation of the case (Lynch Dep. 92).

321. Lynch's testimony is merely his opinion and largely speculative.

322. Lynch read the trial transcript, Applicant's writ and the supporting exhibits (Lynch Dep. 79).

323. Lynch did not interview any of the prospective punishment witnesses to determine if they would be suitable witnesses (Lynch Dep. 93).

324. Lynch did not interview any of the prospective punishment witnesses to determine their credibility (Lynch Dep. 93).

325. Lynch did not speak with Downey about his representation (Lynch Dep. 93).

326. Lynch did not view the defense file (Lynch Dep. 93).

327. Lynch does not know what mitigation information was actually provided to Downey (Lynch Dep. 102).

328. Lynch did not view the State's file (Lynch Dep. 93).

329. Lynch did not view the extraneous offense reports to determine if the testimony of the prospective witnesses would have opened the door to cross-examination on the extraneous offenses (Lynch Dep. 93).

330. Lynch is unfamiliar with Judge Harmon and has never practiced in front of Harmon (Lynch Dep. 93).

331. Lynch has never practiced in Harris County (Lynch Dep. 107).

332. Lynch is not a trial attorney, his primary work is appellate in nature (Lynch Dep. 107-108).

333. Lynch's testimony is based on an incomplete evaluation of the case.

334. Lynch's testimony is unhelpful because a habeas court will not "second-guess through hindsight" the strategy of counsel, nor will the fact that another attorney might have pursued a different course support a finding of ineffectiveness. *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979).

Applicant Fails to Demonstrate
Downey's Performance was Deficient

335. Applicant fails to show Downey's representation fell below an objective standard of reasonableness in any way and that, but for Downey's alleged deficiencies, there is a reasonable probability that the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984).

336. Based on the totality of the representation and the particular circumstances of the case, Downey provided Applicant with reasonably effective assistance of counsel. *See Thompson v. State*, 9 S.W. 3d 808, 813 (Tex. Crim. App. 1999) (A court must look to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel).

337. Even if the facts provided in Applicant's memorandum are considered, Applicant fails to prove that Downey was objectively unreasonable or deficient at any time during Downey's representation of Applicant.

338. There is a strong presumption that Downey's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668.

339. Applicant fails to overcome the strong presumption that trial counsel's actions were reasonable and based on sound trial strategy. *See Ex parte White*, 160 S.W.3d 46, 51 (Tex. Crim. App. 2004); *see also Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

340. When handed the task of determining the validity of a claim of ineffective assistance of counsel, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984).

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

342. In all things, Applicant fails to demonstrate his conviction was improperly obtained or that he is being improperly confined.

THE CLERK IS ORDERED to prepare a transcript and transmit same to the Court of Criminal Appeals as provided by TEX. CRIM. PROC. CODE art. 11.07 (West 2015). The transcript shall include certified copies of the following documents:

1. the application for writ of habeas corpus:

2. the State's answer (including any exhibits and attachments);

3. the depositions recorded on December 17.2019;

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

5. Applicant's proposed findings of fact and conclusions of law:

6. the Court's order:

7. the clerk's record in cause 941903-A:

8. the indictment, judgment and sentence, and docket sheets in cause number 941903:

9. The appellate opinion in cause number 941903.

THE CLERK is further ORDERED to send a copy of this order to counsel for Applicant, Nancy Barohn, 405 South Presa, San Antonio TX 78205, and to counsel for the State, BreAnna Schwartz, 500 Jefferson, Suite 600. Houston, Texas 77002.

By the following signature, the Court adopts the State's Proposed Findings of Fact, Conclusions of Law and Order in Cause Number 941903-A.

SIGNED AND ENTERED.

Signed:
3/12/2020 [Illegible]

JUDGE PRESIDING, 178TH DISTRICT COURT
HARRIS COUNTY, TEXAS

CERTIFICATE OF SERVICE

The undersigned counsel certifies that I have served a copy of State's Proposed Findings of Fact, Conclusions of Law and Order to Counsel for the Applicant on March 1, 2020 by e-mail as follows:

Nancy Barohn
405 South Presa
San Antonio TX 78205
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/s/ BreAnna Schwartz
BreAnna Schwartz
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SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2241

2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or

sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2253

2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or

trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254

2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(b) (I) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State

court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel

for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.