No. _____

In the Supreme Court of the United States

October Term 2021

TYRONE CADE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JOSEPH J. PERKOVICH
COUNSEL OF RECORD
Philips Black, Inc.
PO Box 4544
New York, NY 10163
212-400-1660 (tel.)
j.perkovich@phillipsblack.org

Appendix A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-83,274-03

EX PARTE TYRONE CADE, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS CAUSE NO. W11-33962-R(C) IN THE 265TH DISTRICT COURT DALLAS COUNTY

***Per curiam*.**

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071, § 5.[1]

In August 2012, Applicant was convicted of the offense of capital murder for stabbing his girlfriend and her teenaged daughter to death during the same criminal transaction or pursuant to the same scheme or course of conduct. *See* TEX. PENAL CODE ANN.

[1] Unless we specify otherwise, all references in this order to "Articles" refer to the Texas Code of Criminal Procedure.

§ 19.03(a)(7). The jury answered the special issues submitted under Article 37.071 and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction on direct appeal, *Cade v. State*, No. AP-76,883 (Tex. Crim. App. Feb. 25, 2015) (not designated for publication), and denied relief on his initial Article 11.071 application for writ of habeas corpus, *Ex parte Cade*, No. WR-83,274-02 (Tex. Crim. App. Oct. 25, 2017) (not designated for publication). We dismissed Applicant's first subsequent application, filed in the trial court while his initial writ was still pending there, as an abuse of the writ. *Ex parte Cade*, No. WR-83,274-01 (Tex. Crim. App. Oct. 25, 2017). We received this, Applicant's second subsequent application for a writ of habeas corpus, on December 16, 2020.

Applicant presents twenty-two allegations in the instant subsequent application. In Claim 1, Applicant alleges that the his Sixth and Fourteenth Amendment rights to a fair jury trial and his Fourteenth Amendment right to equal protection were violated under *Batson*.[2] In Claims 2, 4, 5, 6, 7, 10, 11, 13 and 20, Applicant contends that trial counsel rendered ineffective assistance under *Strickland*[3] because they: agreed to excuse veniremembers who expressed very strong support for or opposition to capital punishment in their juror questionnaires (Claim 2); raised an insanity defense instead of investigating and presenting a meritorious defense to capital murder (Claim 4); elicited testimony during the trial's guilt phase that Applicant was a convicted felon (Claim 5); did not timely object to inadmissible

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

[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

and prejudicial victim impact evidence introduced during the guilt phase (Claims 6 and 7[4]); did not develop and present evidence that Applicant is intellectually disabled (Claim 10); did not adequately defend against a finding that Applicant would present a future danger (Claim11); failed to develop and present evidence that Applicant presented no future danger and to object to the State's improper submissions (Claim 13); and conduct a reasonable mitigation investigation (Claim 20).

In Claims 3, 8, 12, 14, 15, 16, and 19, Applicant asserts that the trial court violated his constitutional rights by: denying the defense's challenges for cause to seventeen veniremembers (Claim 3); denying the defense's request for a jury instruction on the lesser included offense of murder (Claim 8); excluding the defense's expert testimony that Applicant did not present a future danger (Claims 12 and 14); permitting Applicant's parole officer to testify that Applicant was manipulative and posed a high risk to reoffend (Claim 15); admitting evidence of crimes committed by other inmates (Claim 16); and overruling the defense's objection to misstatements of law which prevented the jury from considering and giving effect to Applicant's mitigating evidence (Claim 19).

In Claim 9, Applicant alleges that he is intellectually disabled and therefore the Eighth Amendment prohibits his execution. In Claim 17, Applicant avers that the cumulative effect of trial counsel's and the trial court's errors rendered the jury's affirmative answer to the

[4] The headings for Claims 6 and 7 are identical, but the arguments are distinct. Based on Applicant's arguments in Claim 7, we understand him to re-urge Claim 11 of his initial Article 11.071 application, in which he asserted that trial counsel were ineffective because they did not object to the State's allegedly improper guilt phase closing argument.

future dangerousness special issue unconstitutional. In Claim 18, Applicant asserts that the evidence was insufficient to support the jury's affirmative answer to the future dangerousness special issue. In Claim 21, Applicant argues that his death sentence is invalid because the future dangerousness special issue is unconstitutionally vague. In Claim 22, Applicant alleges that Texas's death penalty statute unconstitutionally limits the evidence that a jury can consider as sufficiently mitigating for a life sentence.

We have reviewed the subsequent application and find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the subsequent application as an abuse of the writ without considering the merits of the claims.

IT IS SO ORDERED THIS THE 31ST DAY OF MARCH, 2021.

Do Not Publish

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TYRONE CADE,	)	
	)	
Petitioner,	)	
	)	CIVIL ACTION NO.
VS.	)	
	)	3:17-CV-3396-G-BT
BOBBY LUMPKIN, Director,	)	
	)	
Respondent.	)	

ORDER

The petitioner Tyrone Cade ("Cade") has filed a motion (docket entry 120) asking this court to reconsider its Memorandum Opinion and Order issued August 18, 2020 (docket entry 119) which granted Cade's motion to stay and hold this case in abeyance to permit Cade to return to state court and exhaust state remedies.

In his motion for stay and abeyance and supporting briefs, Cade proposed to present the state courts with some but not all of his new claims for federal habeas relief, some but not all of the legal and factual theories underlying those claims, and, most disturbing of all, some but not all of the evidence supporting his new claims. Confronted with Cade's proposal to attempt to create profound procedural problems, the Magistrate Judge recommended that Cade be directed instead to fairly present the state courts with all of Cade's new claims, all of the factual and legal theories supporting those claims, and all evidence supporting those claims. This court

adopted the Magistrate Judge's recommendation, in part, to hopefully avoid a plethora of potential procedural problems once Cade returned to this court.

Nothing in Cade's motion for reconsideration warrants such relief. In fact, Cade's certificate of conference contains a concise explanation, attributed to the Texas Attorney General's Office, as to precisely why Cade's motion should be denied.

Accordingly, it is hereby **ORDERED** that all relief requested in Cade's motion for reconsideration, filed September 18, 2020 (docket entry 120), is **DENIED**.

SO ORDERED.

September 23, 2020.

A. JOE FISH
Senior United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TYRONE CADE, PETITIONER, VS. BOBBY LUMPKIN, Director, Respondent.	)	CIVIL ACTION NO. 3:17-CV-3396-G-BT

MEMORANDUM OPINION AND ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The matters before the court are (1) Petitioner's motion for stay and abeyance, filed December 18, 2019 (docket entry 100), (2) Respondent's response to the motion for stay and abeyance, filed January 8, 2020 (docket entry 104), (3) Petitioner's reply to Respondent's response, filed January 22, 2020 (docket entry 107), (4) the Magistrate Judge's Findings, Conclusions, and Recommendation, filed July 2, 2020 (docket entry 117), and (5) Petitioner's objections to the Magistrate Judge's FCR, filed July 20, 2020 (docket entry 118). For the reasons discussed below, this Court will accept the Magistrate Judge's Findings, Conclusions, and Recommendation that Petitioner's motion for stay and abeyance be granted and this cause be stayed to permit Petitioner's return to state court to exhaust state remedies on all claims Petitioner has included in his first

amended federal habeas corpus petition (docket entry 79), as supplemented by Petitioner's subsequent pleadings, *i.e.*, docket entries 102 & 114.

A District Court has discretion to stay its proceedings to permit a petitioner to exhaust a claim in state court if it finds good cause for a petitioner's failure to exhaust a claim that is not plainly meritless and where the petitioner has not engaged in intentionally dilatory litigation tactics. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Petitioner requested a stay to allow him to return to state court and exhaust state habeas remedies on five identified claims. The Magistrate Judge correctly concluded that the Texas legal landscape surrounding Petitioner's *Atkins* claim was sufficiently confusing and ambiguous throughout the time frame that Petitioner litigated his initial state habeas corpus proceeding as to warrant permitting Petitioner to return to the state courts to litigate his *Atkins* claim now that the Supreme Court's decisions in *Moore v. Texas*, 37 S. Ct. 1039 (2017) (*Moore I*), and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*), have clarified that legal landscape. In so finding, the Magistrate Judge implicitly concluded Petitioner's *Atkins* claim is not plainly without merit. Neither party appears to disagree with the Magistrate Judge's findings or conclusions in this regard.

The Magistrate Judge's conclusions that Petitioner's remaining claims might not independently warrant a stay and abeyance in this cause are effectively rendered moot by her recommendation that Petitioner be directed to exhaust available state remedies on *all* of the claims Petitioner has asserted in his first amended petition for federal habeas corpus relief. In so recommending, the Magistrate Judge effectively suggested a

procedure under which all issues regarding whether any of Petitioner's claims in his first amended petition have previously been exhausted in the state courts will be rendered moot. By permitting Petitioner an opportunity to exhaust available state remedies on all of his claims for federal habeas corpus relief currently before this Court, the Magistrate Judge has suggested a way to avoid the type of intentionally dilatory tactics the Supreme Court abjured in *Rhines.* The Court will accept the Magistrate Judge's recommendation and direct Petitioner to exhaust available state remedies on all of the claims he has presented to this Court in his latest operative pleading, as well as all factual theories and all evidence supporting those claims. Petitioner's objections to the Magistrate Judge's findings, conclusions, and recommendation will, therefore, be overruled.

Under the AEDPA, the proper place for the factual development of a federal habeas corpus petitioner's federal constitutional claims is the state courts. *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *Hernandez v. Johnson*, 108 F.3d 554, 558 n.4 (5th Cir. 1997).

It is hereby ORDERED that:

1. Petitioner's objections to the Magistrate Judge's findings, conclusions, and recommendation, filed July 20, 2020 (docket entry 118), are OVERRULED.

2. The Magistrate Judge's findings, conclusions, and recommendations, filed July 2, 2020 (docket entry 117), are ADOPTED as set forth below.

3. Petitioner's motion for stay and abeyance, filed December 18, 2019 (docket

entry 100), is GRANTED as set forth below.

4. These proceedings are STAYED while Petitioner pursues state habeas remedies in accordance with the recommendation and this memorandum opinion and order as set forth below.

5. On or before sixty days from this date, Petitioner shall (a) file in the appropriate state court his application for leave to file a second or subsequent state habeas corpus application, (b) include in his second or subsequent state habeas corpus application all of the claims that he wishes this federal court to consider in ruling on his petition for federal habeas corpus relief (including all claims contained in Petitioner's first amended federal habeas corpus petition) and all of the factual allegations supporting those same claims that he wishes to raise in this court, and (c) fairly present the state court with all of the evidence supporting his claims for federal habeas corpus relief that he wishes this court to consider in ruling on his claims for federal habeas corpus relief.

6. Unless Petitioner obtains the sought relief in state court, Petitioner shall return to this Court within forty-five days after he has exhausted his state court remedies and file a motion to reopen this case.

7. If relief is granted by the state court, the Respondent shall promptly notify this Court and if such grant of relief causes the remaining claims contained in Petitioner's first amended federal habeas corpus petition to become moot, then these proceedings will be dismissed.

8. If Petitioner fails to comply with this memorandum opinion and order, these

proceedings will be dismissed.

9. The Clerk is directed to administratively close this case for statistical purposes but nothing in this memorandum opinion and order shall be construed as a final dismissal or disposition of this case.

10. This case shall be reopened upon proper motion filed in accordance with the provisions of this memorandum opinion and order.

SO ORDERED.

August 19, 2020.

A. JOE FISH
Senior United States District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TYRONE CADE,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action No. 3:17-cv-3396-G-BT
	§	
LORIE DAVIS, Director,	§	
	§	
Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Tyrone Cade has filed a motion for stay and abeyance (ECF no. 100). For the following reasons, the Court should GRANT the motion.

Background

On March 27, 2011, Cade fatally stabbed his girlfriend and her teenage daughter. He later turned himself into law enforcement authorities and gave a videotaped confession. *Cade v. State*, AP-76,883, 2015 WL 822421, *1-*2 (Tex. Crim. App. Feb. 25, 2015). At the guilt-innocence phase of his trial, Cade's trial counsel asserted an insanity defense under Section 8.01 of the Texas Penal Code, which the jury rejected. The jury convicted Cade of capital murder; it also subsequently answered the Texas capital sentencing scheme's future dangerousness special issue affirmatively and the mitigation special issue negatively. The Texas Court of Criminal Appeals (TCCA) affirmed Cade's conviction and sentence. *Cade v. State*, AP-76,883, 2015 WL 822421, *41. Cade

filed an application for state habeas corpus relief which the TCCA denied. *Ex parte Cade*, WR-83,274-01, 2017 WL 4803802 (Tex. Crim. App. Oct. 25, 2017).

Thereafter, on March 28, 2019, Cade filed his first amended federal habeas corpus petition in this court (ECF no. 79), asserting twenty claims for relief. Respondent filed her answer on July 26, 2019 (ECF no. 82). Cade filed his reply brief November 12, 2019 (ECF no. 98). Respondent was granted leave to file a sur-reply on January 23, 2020 (ECF no. 110). Cade filed his final reply brief on the merits on March 23, 2020 (ECF no. 114).

Now, Cade requests a stay and abeyance to permit him to return to state court and exhaust state habeas corpus remedies on five of his claims in his first amended petition: claim 4 (in which he argues that his trial counsel rendered ineffective assistance by failing to raise a mental health defense at the guilt-innocence phase of trial other than that of insanity); claim 9 (in which he is exempt from execution because he is intellectually disabled, i.e., his *Atkins* claim); claim 11 (ineffective assistance based upon his trial counsel's failure to investigate and present available mitigating evidence showing his lack of propensity for future dangerousness); claim 15 (cumulative error); and claim 18 (ineffective assistance arising from his trial counsel's failure to investigate and present available mitigating evidence).

Legal Standards

The Supreme Court has made it clear that a federal habeas court should defer action on a mixed petition such as Cade's first amended petition until the

appropriate state court has had the first opportunity to rule on the merits of an unexhausted claim. *Rhines v. Weber*, 544 U.S. 269, 273-74 (2005). A stay is the appropriate means of fulfilling the principles of comity underlying the exhaustion doctrine. *Rhines*, 544 U.S. at 276. A stay and abeyance is only appropriate when the federal habeas court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. *Id.*, at 277. Even if good cause exists for the failure to exhaust, a stay is inappropriate when the unexhausted claim is plainly meritless. *Id.*

Exhausted Claims

Cade seeks leave to return to state court to re-litigate two claims, i.e., claim 4 and claim 18, which he fully litigated and on which he obtained rulings on the merits from the Texas Court of Criminal Appeals during his first state habeas corpus proceeding. Insofar as he argues that the Supreme Court's holdings in *Martinez v. Ryan,* 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), allow him to re-litigate with new evidence these two claims, he misconstrues the holdings in those two Supreme Court opinions. The Supreme Court's holding in *Martinez v. Ryan* furnishes a narrow avenue for circumventing a procedural default. It requires a showing that the performance of state habeas counsel was so deficient as to *completely preclude* state court merits review of a meritorious claim of ineffective assistance by trial counsel, thus permitting a federal habeas court to undertake a merits review of the otherwise procedurally defaulted complaint of ineffective assistance by state trial counsel. *See In re Edwards*, 865 F.3d 197, 207-

08 (5th Cir. 2017) (To show cause for procedural default under *Martinez* and *Trevino*, "the petitioner must show (1) that his claim of ineffective assistance of counsel at trial is 'substantial' (i.e., 'has some merit'); and (2) that his habeas counsel was ineffective for failing to present those claims in his first state habeas application." (quoting *Beatty v. Stephens*, 759 F.3d 455, 465-66 (5th Cir. 2014)); *Prystash v. Davis*, 854 F.3d 830, 836 (5th Cir. 2017) (holding the Supreme Court's rulings in *Martinez* and *Trevino* created a narrow exception to the general rules of procedural default that applies only to a claim of ineffective assistance by state trial counsel).

Cade was not precluded by his state habeas counsel's allegedly ineffective assistance from fairly presenting and obtaining a ruling on the merits from the TCCA of either of these ineffective assistance claims during his state habeas corpus proceeding. On the contrary, the TCCA rejected both claims on the merits. Thus, Cade may not rely on *Martinez* or *Trevino* to justify a stay in this cause to allow Cade to return to state court and attempt to re-litigate those two claims using new factual allegations and new evidence. Likewise, Cade may not re-litigate those claims in this court using new factual allegations and new evidence. *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that 'resulted in' a decision that was contrary to, or 'involved' an unreasonable application of, established law. This backward-looking language requires an

examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.,* the record before the state court.").

Thus, Cade is not entitled to a federal evidentiary hearing on any of his claims which were rejected on the merits by the state courts, either on direct appeal or during his state habeas corpus proceeding. *See Halprin v. Davis*, 911 F.3d 247, 255 (5th Cir. 2018) ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." (quoting *Pinholster*, 563 U.S. at 185)), *cert. denied*, 140 S. Ct. 167 (2019). He is not entitled to a stay of this proceeding so that he can return to state court and seek to re-litigate the same claims with new evidence.

Likewise, Cade's complaints of ineffective assistance by his state habeas counsel during his first state habeas corpus proceeding do not furnish an independent basis for federal habeas corpus relief. Infirmities in state habeas corpus proceedings do not give rise to a basis for federal habeas relief. *See, e.g., Stevens v. Epps*, 618 F.3d 489, 502 (5th Cir. 2010) (allegedly inadequate funding and staffing of the Mississippi Office of Capital Post-Conviction Counsel); *Haynes v. Quarterman*, 526 F.3d 189, 195 (5th Cir. 2008) (alleged ineffective assistance by initial state habeas counsel); 28 U.S.C. § 2254(i). Cade is not entitled to a stay and abeyance of this cause so that he can return to state court and seek to re-litigate claims on which he has already obtained a ruling on the merits.

Intellectual Disability Claim[1]

Cade also seeks leave to return to state court to litigate a new *Atkins* claim (claim 9). During his capital murder trial, Cade presented testimony from several different mental health experts. None suggested Cade was intellectually disabled. In his first amended petition, Cade admits that he is a high school graduate who briefly attended community college but insists his academic deficits qualify him as intellectually disabled. First. Am. Pet. (ECF no. 79) at 82-88. At no point in his first amended petition, however, does Cade allege any specific facts showing that any of the mental health professionals who have evaluated him has ever diagnosed Cade as intellectually disabled.

The Supreme Court's case law addressing intellectual disability does not provide a uniform definition for the condition. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court concluded the execution of "mentally retarded" persons failed to fulfill either of the two justifications for capital punishment, *i.e.*, retribution and deterrence, and held the Eighth Amendment

[1] While the parties' pleadings in both the state habeas court and this court occasionally employ the terms "mental retardation" and "mentally retarded," the undersigned uses the terms "intellectual disability" and "intellectually disabled." *See In re Cathey*, 857 F.3d 221, 223 n.1 (5th Cir. 2017) ("The term 'intellectual disability' has replaced 'mental retardation.'" (citing *Brumfield v. Cain*, 576 U.S. 305, ____ n.1, 135 S. Ct. 2269, 2274 n.1 (2015)); *see also Hall v. Florida*, 572 U.S. 701, 704-05 (2014) ("This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts, the manual is often referred to by its initials 'DSM,' followed by its edition numbers, *e.g.*, 'DSM-5.'").

forbids the execution of mentally retarded persons. *Atkins*, 536 U.S. at 318-21. The Supreme Court cited two clinical definitions of "mental retardation" with approval:

> The American Association on Mental retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Mental retardation manifests before age 18." Mental Retardation, definition, Classification, and Systems of Supports 5 (9th ed. 1992).

[and]

> The American Psychiatric Association's definition is similar. "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild mental retardation is typically used to describe people with an IQ of 50-55 to approximately 70. *Id.*, at 42-43.

Id., at 309 n.3. But, ultimately, the Court left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.*, at 317; *see also Bobby v. Bies*, 556 U.S. 825, 831 (2009) (noting *Atkins* did not provide definitive procedural or substantive guides for determining when a person who claims intellectual disability will be so impaired as to fall within *Atkins'* limits).

Nonetheless, the Supreme Court recognizes that "an IQ between 70 and 75 or lower" is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Brumfield v. Cain,* 576 U.S. 305, 315, (2015) (quoting *Atkins*, 536 U.S. at 309 n.5). Thus, an IQ score of 75 is "squarely in the range of potential intellectual disability." *Brumfield*, 576 U.S. at 315.

Regarding the first prong of the *Atkins* analysis, *i.e.*, establishing significantly subaverage intellectual functioning, the Supreme Court has held that, because of the imprecision inherent in IQ testing,[2] a court must consider the standard error of measurement (SEM) when assessing intellectual disability:

[2] In *Hall v. Florida*, 572 U.S. 701 (2014), the Supreme Court explained in some detail the nature of the imprecision inherent in IQ testing as follows:

> The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range. Each IQ test has a "standard error of measurement," often referred to by the abbreviation "SEM." A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. An individual's IQ test score on any given exam may fluctuate for a variety of reasons. These include the test taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing. . . . The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For the purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies. . . . Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor. In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations

> The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals. And the professional community's teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession.
>
> By failing to take into account the SEM and setting a strict cutoff at 70, Florida "goes against the unanimous professional consensus." APA Brief 15. Neither Florida nor its *amici* point to a single medical professional who supports this cutoff. The DSM–5 repudiates it: "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." DSM–5, at 37. This statement well captures the Court's independent assessment that an individual with an IQ test score "between 70 and 75 or lower," *Atkins, supra,* at 309, n. 5, 122 S.Ct. 2242, may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.

Hall v. Florida, 572 U.S. 701, 721-22 (2014).

In *Moore v. Texas*, 581 U.S. ___, ___, 137 S. Ct. 1039, 1048-53 (2017) (*Moore I*), the Supreme Court further restricted States' ability to circumscribe the legal definition of "intellectual disability," holding (1) a State's determination under *Atkins* must be guided by current medical standards[3] and (2) States are not

---

> may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.

Hall, 572 U.S. at 712-14 (internal citations and quotations omitted).

[3] *Moore I*, 137 S. Ct. at 1048-49 ("Although *Atkins* and *Hall* left to the States "the task of developing appropriate ways to enforce" the restriction on executing the intellectually disabled, States' discretion, . . ., is not "unfettered." Even if "the views of medical experts" do not "dictate" a court's intellectual-disability determination, . . ., the determination must be "informed by the medical community's diagnostic

free to adopt criteria unsupported by medical science to evaluate a defendant's alleged subaverage intellectual functioning or deficits in adaptive skills.[4] More specifically, the Supreme Court held the TCCA erred in applying a set of non-clinical criteria known as the *Briseno* factors in evaluating a defendant's claim of intellectual disability because (1) some of the *Briseno* factors had implicitly been rejected by the medical community (in part because they were based on outdated stereotypes) and (2) all the *Briseno* factors were little more than lay perceptions of intellectual disability untethered to any clinical medical standard. *Moore I*, 137 S. Ct. at 1050-53. Two years later, in *Moore v. Texas*, 139 S. Ct. 666, 668-72 (2019) (*Moore II*), the Supreme Court again struck down as a violation of the Eighth

framework." . . . Florida, . . ., had violated the Eighth Amendment by "disregarding established medical practice" [and] . . . parted ways with practice and trends in other States. *Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.") (citations omitted).

[4] For example, the Supreme Court pointed out the Texas appellate court focused on Moore's perceived adaptive strengths in certain areas when the current clinical approach called for identification of deficits in adaptive skills. *Moore I*, 137 S. Ct. at 1050. The Texas appellate court also pointed out Moore's improved behavior in prison; whereas the Supreme Court noted clinicians caution against reliance on adaptive strengths developed in a controlled setting. *Id.* The Texas appellate court attempted to explain away Moore's poor academic performance by pointing to traumatic childhood abuse and suffering; the Supreme Court pointed out the medical community employed such traumatic experiences as "risk factors" sufficient to explore the prospect of intellectual disability. *Id.*, at 1051. The Texas appellate court required Moore to show that his adaptive deficits were unrelated to his "personality disorder"; the Supreme Court pointed out mental health professionals have long recognized that intellectual disability may be co-morbid with a wide variety of personality disorders, attention-deficit disorder, depression, and even bi-polar disorder. *Id.*

Amendment a new TCCA determination that Moore was intellectually disabled, finding the TCCA had committed many of the same analytical errors identified in *Moore I*.

Thus, the Supreme Court's case law addressing intellectual disability does not employ a uniform definition of the condition. Instead, the Supreme Court recognizes the distinction between the medical and legal definitions of intellectual disability and directs the States to craft their own approaches to the issue. And the Supreme Court has reversed state courts for straying too far from current, best medical practices. The result is a fluid legal landscape in which state courts and legal practitioners have operated since *Atkins*.

What is clear at this juncture is that whether Cade is intellectually disabled is a question of fact. *Matamoros v. Stephens*, 783 F.3d 212, 216 (5th Cir. 2015); *Maldonado v. Thaler*, 625 F.3d 229, 236 (5th Cir. 2010). The Supreme Court and Fifth Circuit have both made clear that, under the AEDPA, the proper place for development of the factual bases for federal habeas claims is the state courts. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("Section 2254(d) thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding."); *Hernandez v. Johnson*, 108 F.3d 554, 558 n.4 (5th Cir. 1997) (holding AEDPA clearly places the burden on a federal habeas petitioner to raise and litigate as fully as possible his federal claims in state court).

Cade alleges that he has tested in the 76-80 range on standardized IQ tests and his background demonstrates multiple deficits in adaptive behavior. Considering the SEM of plus or minus five points for most IQ tests, and the possible application of the "Flynn effect," which neither party has yet addressed in a meaningful manner, Cade's allegations put him at least within the range of a possible diagnosis of intellectual disability. Cade argues persuasively that he should be permitted to return to state court to argue and present evidence showing that he is intellectually disabled - a contention which if proven, would render moot many of the other claims Cade has presented to this federal habeas court in his first amended petition. Cade also correctly points out that the TCCA's persistent reliance upon the *Briseno* factors, *see Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004), created analytical confusion within the Texas appellate courts which lasted beyond the Supreme Court's opinion in *Moore I*.

Before this court appoints mental health experts to explore whether Cade is intellectually disabled and expends scarce judicial resources to hold an evidentiary hearing and determine whether *in fact* Cade is intellectually disabled, the state courts should be permitted an opportunity to address that critical factual issue. To do otherwise would run counter to the principles of federalism and comity that form the basis of the exhaustion doctrine and that underlie the expressions of congressional intent found within the AEDPA.

The legislative history of the AEDPA indicates that it was intended as a limitation upon the scope of federal habeas review. One of the principal purposes

of the AEDPA was to reduce delays in the execution of state and federal criminal sentences, especially capital sentences. *Ryan v. Gonzales*, 568 U.S. 57, 76 (2013); *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007); *Rhines*, 544 U.S. at 276. Another purpose of the AEDPA was to encourage litigants to pursue claims in state court prior to seeking federal collateral review. *Duncan v. Walker*, 533 U.S. 167, 181 (2001); *see also Hernandez*, 108 F.3d at 558 n.4 (the AEDPA imposes the burden on a petitioner to litigate to the maximum extent possible, including fairly presenting all available evidence supporting, his claims in state court). The AEDPA was also intended to prevent piecemeal litigation and gamesmanship. *Magwood v. Patterson*, 561 U.S. 320, 334 (2010). Thus, under the AEDPA, federal habeas review of claims is limited to the record that was before the state court that adjudicated the prisoner's claims on the merits. *Pinholster*, 563 U.S. at 182. "The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Day v. McDonough*, 547 U.S. 198, 205-06 (2006). Collectively, the provisions of the AEDPA further the principals of comity, finality, and federalism. *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007); *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Cade's request for a stay and abeyance to permit him to return to state court and to exhaust available state habeas corpus remedies on his currently unexhausted intellectual disability claim in a post-*Moore* context should be

granted. The inconsistency found within the Texas appellate courts and among Texas legal practitioners by the TCCA's reliance upon the *Briseno* factors justifies permitting Cade an opportunity to fully and fairly litigate his intellectual disability claim in the state courts. Cade's state trial counsel, state appellate counsel, and state habeas counsel confronted a State legal landscape influenced by evolving Supreme Court precedent that attempted to define the term intellectual disability and the TCCA's *Briseno* factors. Counsels' decision to forego an attempt to assert an *Atkins* claim may have been based upon their understanding of the manner in which the TCCA applied the *Briseno* factors to deny intellectual disability claims. Under such circumstances, Cade should be permitted to return to state court and litigate his intellectual disability claim, which if successful, will render moot many of his claims for federal habeas corpus relief, especially those challenging the legitimacy of his death sentence.

Because Cade is entitled to a stay and abeyance to permit state court consideration of his intellectual disability claim, he should be permitted to seek state court review on any and all of the claims he has included in his first amended petition for federal habeas corpus relief. A stay should be issued consistent with the holding in *Rhines*. Cade will have an opportunity in his second or subsequent state habeas corpus proceeding to fairly present the state courts with all of the claims that he has included in his first amended federal habeas corpus petition, all the factual allegations supporting those claims, and (through properly

authenticated documents, affidavits, and sworn declarations) all of the evidence he wishes to present in support of those claims.

Avoiding Unnecessary Delay

To avoid unnecessary delay in the disposition of the forthcoming state habeas corpus proceeding, Cade should be directed to file his application for leave to file a second or subsequent state habeas corpus application in the appropriate state court in an expeditious manner.

Recommendation

Cade's motion for stay and abeyance (ECF No. 100) should be **GRANTED**; and Cade should be directed within 30 days to (1) file in the appropriate state court his application for leave to file a second or subsequent state habeas corpus application, (2) include in his second or subsequent state habeas corpus application (a) all of the claims that he wishes this federal court to consider in ruling on his petition for federal habeas corpus relief and (b) all of the factual allegations supporting those same claims that he wishes to raise in this court, and (3) present the state court with all of the evidence supporting his claims for federal habeas corpus relief that he wishes this court to consider in ruling on his claims for federal habeas corpus relief.

SIGNED July 2, 2020.

REBECCA RUTHERFORD
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO OBJECT

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

Appendix E

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

WR-83,274-01

EX PARTE TYRONE CADE

ON APPLICATION FOR WRIT OF HABEAS CORPUS CAUSE NO. F11-33962-R IN THE 265TH DISTRICT COURT DALLAS COUNTY

***Per curiam*.**

O R D E R

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

On August 29, 2012, Applicant was convicted of the offense of capital murder. *See* TEX. PENAL CODE ANN. § 19.03. The jury answered the special issues submitted under Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Cade*

v. State, No. AP-76,883 (Tex. Crim. App. Feb. 25, 2015) (not designated for publication). Applicant's initial post-conviction application for writ of habeas corpus is currently pending in the convicting court. *See* TEX. CODE CRIM. PROC. ANN. Art. 11.071. Applicant's instant post-conviction application for writ of habeas corpus was received in this Court on May 13, 2015.

Applicant presents one allegation in the instant application. We have reviewed the application and find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the application as an abuse of the writ without considering the merits of the claim.

IT IS SO ORDERED THIS THE 25TH DAY OF OCTOBER, 2017.

Do Not Publish

Appendix F

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-83,274-02

EX PARTE TYRONE CADE, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. F11-33962-R IN THE 265TH JUDICIAL DISTRICT COURT DALLAS COUNTY

***Per curiam*. ALCALA, J., concurred.**

O R D E R

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

In August 2012, a jury convicted applicant of capital murder for stabbing his girlfriend and her teenaged daughter to death during the same criminal transaction or pursuant to the same scheme or course of conduct. *See* TEX. PENAL CODE § 19.03(a)(7). The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court

affirmed applicant's conviction and sentence on direct appeal. *Cade v. State*, No. AP-76,883, slip op. at 3 5 (Tex. Crim. App. Feb. 25, 2015) (not designated for publication).

The record shows that applicant had been romantically involved with Mischell Fuller for many years and that they had also lived together for several years preceding the offense. Fuller's seventeen-year-old daughter, Desaree Hoskins, lived with them.

However, by the time of the killings, applicant and Fuller's relationship had deteriorated. Factors contributing to this deterioration included: applicant's status as a registered sex offender following his 1999 conviction for aggravated sexual assault; applicant's inability to work due to a back injury that caused him chronic pain; and the rekindling of Fuller's relationship with Karlton Hoskins, her ex-husband and Desaree's father. Although they still slept in the same bed, applicant and Fuller had not been sexually intimate for several months and Fuller had repeatedly asked applicant to move out.

Fuller and Desaree died sometime during the early hours of March 27, 2011. Later that day, applicant turned himself in by calling 9-1-1 from a pay phone in a police station lobby. After being advised of his constitutional rights, applicant gave a detailed, video-recorded confession.

> According to [applicant's] statements, on the evening of March 26, 2011, he hid a recording device near Fuller's side of the bed, then went to a strip club with his cousin. After a few hours in the club, followed by an unsuccessful search for prostitutes, [applicant] returned to Fuller's house around 2:00 a.m. The recording device had captured a Skype conversation between Fuller and Karlton, and [applicant] listened to it when he returned

> home. Roughly two hours into the recording, [applicant] heard the conversation become sexual in nature.
>
> Soon thereafter, [applicant] got into bed with Fuller, who fell asleep but was later awakened by [applicant]'s tossing and turning in bed. When Fuller told [applicant] to lie down and go to sleep, [applicant] showed Fuller a kitchen knife. Fuller began screaming when she saw the knife, and [applicant] repeatedly stabbed her. Fuller's screams woke Desaree, who ran into the bedroom to help her mother. [Applicant] stabbed Desaree several times and then returned to Fuller. When Desaree started to get up, [applicant] stabbed her again multiple times as she screamed and attempted to crawl away from him. When Desaree stopped screaming and moving, [applicant] walked back to Fuller, who was still alive and conscious. [Applicant] vaginally and anally raped Fuller, claiming that he ejaculated "[i]n her, on her, everywhere" because she made him feel like a sex offender. [Applicant] believed Fuller lived for thirty to forty minutes after he first stabbed her, and he asserted that he sexually assaulted her for twenty to thirty minutes of that time. While he was sexually assaulting Fuller, [applicant] heard Desaree speaking. He believed that Desaree survived longer than Fuller.

Id. at 3 4 (internal footnote omitted).

As we stated in our direct appeal opinion, the investigation additionally produced the following evidence.

> Officers found Fuller's body in the master bedroom, face down and naked below the waist. Fuller's buttocks and vaginal area were propped up on several pillows; a bottle of lubricant lay next to her body. Desaree's body was in the hallway, immediately outside the bedroom. In a bathroom, officers found a bloody knife and notebook containing [applicant]'s handwritten notes. [Applicant] wrote that Fuller had "kicked [him] to the curb" when she began trying to mend the relationship between Karlton and her children. [Applicant] also wrote that, because he could not live without Fuller, he took Fuller from himself and "from . . . anyone else." Although he expressed remorse for the killings, [applicant] also frequently deflected responsibility away from himself, writing, for example, "[Fuller] used to treat me so good. Not like a sex offender"; "I'm truly sorry, she drove me crazy trying to fix things with her kids and the father"; "I feel bad for so many people, especially who knew . . . [Fuller]. All I can say is she had a

> bad side . . . . It wasn't always sunshine"; and "Thank Karlton Hoskins for this one."
>
> The medical examiner, Jill Urban, M.D., testified that Fuller died from being stabbed twenty-eight times. Urban found defensive wounds on Fuller's hands and wrists. Several wounds to Fuller's face, neck, and chest area were between four and five inches deep. Desaree's death resulted from thirty-nine stab wounds, many of which were also between four and five inches deep. Urban testified that the perpetrator used a great deal of force in inflicting Desaree's injuries, noting that the wounds penetrated her bones.

Id. at 4 5 (internal footnotes omitted).

Applicant presented an insanity defense at trial. Applicant premised this defense on the theory that he had entered a state of "abandonment rage" at the time of the offense due to his personal history and the various stressors that he had then been experiencing. The jury nonetheless found applicant guilty of capital murder as alleged in the indictment. After considering the punishment phase evidence presented by both parties, the jury answered "yes" to the future-dangerousness special issue and "no" to the mitigation special issue. *See* TEX. CODE. CRIM. PROC. art. 37.071, §§ 2(b)(1), (e)(1).

In his application, applicant presents sixteen claims for relief in which he challenges the validity of his judgment and sentence. The trial court held a live evidentiary hearing. The trial court subsequently entered findings of fact and conclusions of law and recommended that the relief sought be denied.

We have reviewed the record regarding applicant's allegations. Claim 4, in which applicant alleges that his due process right to a fair trial was violated when the trial court excluded the testimony of Dr. Mark Vigen and Dr. Jonathan Sorensen from the

punishment phase, is procedurally barred because this claim was raised and rejected on direct appeal. *See Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984) (stating that claims that are raised and rejected on direct appeal are generally not cognizable in a writ of habeas corpus). Claims 13, 15, and 16, in which applicant raises constitutional challenges to Texas's capital sentencing scheme, are procedurally barred for the same reason. *See id.* Claim 14, in which applicant raises another constitutional challenge to Texas's capital sentencing scheme, is procedurally barred because habeas is not a substitute for matters which should have been raised on direct appeal. *See Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) ("It is 'well-settled that the writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal.'").

In Claims 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, and 12, applicant alleges that his trial counsel were constitutionally ineffective for: presenting an objectively unreasonable insanity defense (Claim 1); failing to investigate and present mitigating evidence (Claim 2); failing to present a social historian to explain the impact of applicant's social history (Claim 3); not presenting the testimony of Dr. Antoinette McGarrahan at the punishment phase of trial (Claim 5); failing to adequately voir dire prospective juror Nily regarding the insanity defense (Claim 6); failing to request the removal of Juror Brown (Claim 7); eliciting testimony during the guilt-innocence phase that applicant was a convicted felon (Claim 8); failing to preserve their pretrial objection to the admission of evidence, at the

guilt-innocence phase, that applicant was a registered sex offender (Claim 9); failing to timely object to victim-impact evidence offered at the guilt-innocence phase (Claim 10); failing to object to the State's improper guilt-innocence phase closing argument (Claim 11); and depriving applicant of a full review of the record of his trial (Claim 12). However, applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the 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).

Turning to the trial court's findings and conclusions, we do not adopt factual findings numbers 476 through 479, which concern applicant's Claim 11. *See Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008).

We also do not adopt factual findings numbers 548 through 553, which concern testimony that Dr. Seth Silverman gave at the evidentiary hearing on applicant's habeas claims. *See id.* We further do not adopt the paragraph which immediately precedes factual finding number 548. That paragraph reads:

> During the writ hearing on this application, [a]pplicant presented the testimony of [a] psychiatrist, Dr. Seth Silverman. Dr. Silverman's testimony does not appear to pertain to any of the sixteen grounds for relief presented in the application for habeas relief. The Court makes the following findings and conclusions to address his testimony and any potential claim related to it.

See id. Based upon our independent review of the record and consistent with our role as the ultimate factfinder in habeas corpus proceedings, we instead make our own finding, as follows:

> At the evidentiary hearing, applicant presented the testimony of Dr. Seth Silverman, a psychiatrist. The Court makes the following findings and conclusions regarding Dr. Silverman's testimony.

See id.

We otherwise adopt the trial court's findings and conclusions. Based upon the trial court's findings and conclusions that we have adopted, our own review of the record, and our independent findings and conclusions, we deny relief.

IT IS SO ORDERED THIS THE 25TH DAY OF OCTOBER, 2017.

Do Not Publish

Appendix G

W11-33962-R(A)

In the 265th Judicial District Court
of Dallas County, Texas

Ex parte
Tyrone Cade

FINDINGS OF FACT AND CONCLUSIONS OF LAW

TABLE OF CONTENTS

Having considered (1) the original application for writ of habeas corpus, (2) the State's answer, (3) official court documents and records from the trial, direct appeal, and these writ proceedings, (4) evidence presented at the hearing conducted on June 22-28, 2016 and November 17, 2016, (5) the arguments presented by the parties on February 24, 2016, and (6) the Court's personal experience and knowledge, the Court makes the following findings of fact and conclusions of law:

BACKGROUND FACTS

Applicant was convicted and sentenced to death for the 2011 murders of Mischell Fuller and her seventeen-year-old daughter Desaree Hoskins.

At the time of the offense, Applicant was living in Mischell's house with Mischell, Desaree, and Applicant's eleven-year-old daughter Tyra.[1] (RR44: 17, 69, 75; State's Trial Ex. 131-A[2] at p. 7). Desaree was Mischell's daughter from a previous marriage to Karlton Hoskins, who was in prison when Applicant and Mischell began dating. (RR44: 65-66, 93). Michael, Mischell's older son with Karlton, lived in Denton. (RR44: 65, 69-70). Applicant and Mischell had been dating for seven to ten years and had been living together for the past three to four years. (RR44: 69; RR49: 222; RR51: 34).

In the period leading up to the offense, problems between Applicant and Mischell had developed and gradually worsened. To begin with, Applicant had a prior sexual-assault conviction and, consequently, was a registered sex offender. (RR44: 76; State's Exhibit 237). Mischell's younger brother had two young children who used to visit Mischell on a regular basis.[3] (RR44: 76, 101-102). But the children's mother put a stop to the visits when she learned about Applicant's sex-offender status. (RR44: 76, 101-102). Additionally, Mischell's children were

[1] "RR" refers to the reporter's record on direct appeal. "CR" refers to the clerk's record on direct appeal. "WR" refer to the reporter's record in these writ proceedings.

[2] State's Exhibit 131-A is the transcript of Applicant's video-recorded confession, given on March 27, 2011. The video was admitted into evidence as State's Exhibit 131, and State's 131-A was admitted into evidence for demonstrative purposes only. (RR44: 284; RR45: 22).

[3] The record shows the brother, Sydney Belcher, died on December 10, 2008. (RR44: 101). In Applicant's confession, he indicated that the children visited Mischell frequently because of their dad's death. (State's Exhibit 131-A at p. 12).

jealous of her relationship with Tyra, making Mischell's relationship with her children difficult. (RR44: 77-78). Because of these problems, Mischell had asked Applicant to move out long before the capital murder. (RR44: 77-78, 101). However, Applicant always had an excuse to stay. (RR44: 70-71).

In September of 2009, Karlton Hoskins was released from prison, creating more problems between Applicant and Mischell. (RR44: 105). Although Karlton lived in Florida, he became a presence in their lives as he began to re-establish his relationship with Desaree and Michael. (RR44: 105, 118-120). Mischell wanted her children to reconnect with their father and did everything she could to encourage their relationship. (RR44: 105, 118-120). Applicant was unhappy about the situation and told Mischell he did not want Karlton calling the house. (RR44: 134-137).

The relationship between Applicant and Mischell was essentially over in the weeks and months leading up to the capital murder. (RR44: 140). The two were no longer having sex, and Mischell was still trying to get Applicant to move out. (RR44: 70-72, 140-141; State's Exhibit 207-A[4] at p. 5).

On the night of March 26, 2011, Applicant secretly placed a recording device beside Mischell's bed and went to a strip club with his cousin. (RR44: 151; RR45: 16). Mischell was asleep when Applicant returned home in the early morning hours of the 27th. (State's Exhibit 131-A at pp. 2-3). As she slept, Applicant listened to the recording and heard Mischell talking to Karlton through Skype.[5] (State's Exhibit 131-A at p. 3). After listening for a while, Applicant grabbed a knife, woke Mischell up, and began stabbing her. (State's Exhibit 131-A at pp. 3-4). Desaree soon ran into the room, awakened by her mother's screams. (State's Exhibit 131-A at p. 4). Applicant turned the knife on Desaree, stabbing her repeatedly before redirecting his focus on Mischell. (State's Exhibit 131-A at p. 4; State's Exhibit 207-A at p. 5). However, Desaree was still alive and began to get up. (State's Exhibit 131-A at p. 4; State's Exhibit 207-A at p. 5). Seeing Desaree

[4] State's Exhibit 207-A is the transcript of Applicant's video-recorded confession, given on March 28, 2011. The video was admitted into evidence as State's Exhibit 207 and State's 207-A was admitted into evidence for demonstrative purposes only. (RR45: 140-141, 144-145).

[5] Skype is a service that allows internet users to communicate via a microphone, webcam, and instant messaging. However, Skype was never explained on the record.

move, Applicant returned to her and stabbed her repeatedly as she screamed and tried to get away from him. (State's Exhibit 131-A at p. 4; State's Exhibit 207-A at pp. 5-6). Once Desaree finally stopped moving, Applicant went back to Mischell and, as she lay there dying, vaginally and anally sexually assaulted her. (State's Exhibit 131-A at p. 4; State's Exhibit 207-A at p. 4).

That evening, Applicant went to the Irving Police Department and used the public phone in the lobby to call 911 and report what he had done. (RR44: 45, 52-53). The 911 operator kept Applicant on the phone until an officer met Applicant in the lobby. (RR44: 51). Applicant confessed his crime to the officer and was taken to an interview room. (RR44: 25-29).

In the meantime, police arrived at Mischell's house to investigate the reported stabbings. (RR44: 175). Inside, they found Mischell's body in the master bedroom and Desaree's body in the hallway immediately outside the master bedroom. (RR44: 180-182, 223, 231-235, 240). Inside one of the bathrooms, police found a bloody knife and a notebook by the sink. (RR44: 243). Applicant's handwritten notes in the notebook accused Mischell of turning him into a sex offender and driving him crazy by trying to mend the relationship between her children and their father. (RR45: 17; State's Exhibit 124). He also wrote, "I can't live without Mischell, therefore I took her away from me and anyone else." (RR45: 18).

Over the course of two police interviews, Applicant confessed in detail about how he stabbed and killed Mischell and Desaree. (RR45: 188-142; State's Exhibit 131; State's Exhibit 207). Autopsies of the two women showed Mischell suffered twenty-eight stab wounds and Desaree suffered thirty-nine stab wounds. (RR45: 83-84, 92). A rape examination of Mischell confirmed that she had been vaginally and anally sexually assaulted. (RR45: 105, 116).

Applicant was eventually charged with capital murder in connection with the deaths of Mischell and Desaree. (CR: 15). The indictment alleged alternative theories of capital murder: (1) murder of more than one person in the same criminal transaction, and (2) murder of more than one person during a different criminal transaction but pursuant to the same scheme and course of conduct. (CR: 15).

At trial, Applicant's defense in the guilt/innocence phase was that he was insane at the time of the offense. He tried to prove his insanity by presenting evidence of his biological father's schizophrenia and schizoaffective disorder, as well as his father's deposition testimony about how Applicant's mother sexually abused Applicant when he was two years old. (RR46: 134; RR47: 83-84). Applicant also tried to show that he was under a lot of stress at the time of the offense because of the pain from a back injury he suffered as a high-school football player and the demise of his relationship with Mischell. (RR46: 94; RR48: 39). Applicant's main insanity expert, Dr. Gilda Kessner, had not examined Applicant but nevertheless diagnosed him with a condition she described as "abandonment rage." (RR48: 39, 53-54). She opined that, because of this condition, he did not know that what he was doing was wrong at the time he stabbed and killed Mischell and Desaree. (RR48: 87-88). In contrast, the State's expert, Dr. Tim Proctor, who had interviewed Applicant as part of his insanity evaluation, opined that Applicant was sane at the time of the offense. (RR48: 118, 122-125, 142). The jury rejected Applicant's insanity defense and found him guilty as charged in the indictment.

In the punishment phase of trial, the State presented evidence of Applicant's criminal history as a juvenile and young adult, his violent conduct towards other men, his possessive and violent behavior in his relationship with an ex-girlfriend, and among other things, his rape of a female acquaintance. The defense witnesses included a former coworker and a cousin, both of whom testified that Applicant was a good father to Tyra. (RR50: 60; RR51: 34). A friend from high school also testified about Applicant's abilities as a football player, as well as the football injury that forced him to stop playing football. (RR51: 14-20). Finally, both the State and defense presented testimony on various aspects of prison life. (RR49: 232-299; RR50: 79-109, 128-181). At the conclusion of the punishment trial, the jury answered the special issues in a manner warranting a sentence of death.

PROCEDURAL HISTORY

In August 2012, a jury convicted Applicant of capital murder and, in accordance with the jury's answers to the special issues, the Court sentenced him to death.

Applicant appealed his conviction and sentence. The Texas Court of Criminal Appeals affirmed this Court's judgment on February 25, 2015. *See Cade*

v. State, No. AP-76,883, 2015 Tex. Crim. App. LEXIS Unpub. 156 (Tex. Crim. App. Feb. 25, 2015) (not designated for publication).

On September 9, 2014, Applicant filed his original application for writ of habeas under article 11.071 of the criminal procedure code. His application alleges sixteen grounds for relief. The State received a statutorily authorized extension of time and filed its answer on March 9, 2015.

On January 22, 2016, this Court entered an order designating issues 1-12 for further investigation. On June 22-28, 2016 and November 17, 2016, the Court conducted a hearing on those issues. The Court ordered the parties to file proposed findings and conclusions by February 3, 2017, and to present oral argument on February 10, 2017. At the request of Applicant, the Court extended the deadline for filing proposed findings to February 17, 2017, and rescheduled oral argument for February 24, 2017.

STATE CLAIMS NOT COGNIZABLE

(1) In grounds 1 through 15, Applicant alleges that his rights under the state constitution, state statutory law, and state case law were violated.

(2) A writ of habeas corpus cannot be invoked for mere statutory irregularities in the proceedings below. *Ex parte Sanchez*, 918 S.W.2d 526, 527 (Tex. Crim. App. 1996). Nor may it be invoked for error that is predicated solely on a violation of the Texas Constitution. *Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989).

(3) Habeas corpus relief is reserved for jurisdictional defects that render the judgment void and for denials of fundamental or constitutional rights. *Sanchez*, 918 S.W.2d at 527.

(4) Applicant does not argue that any of the alleged violations of state constitutional law, statutory law, or common-law rendered this Court's judgment void.

(5) Thus, to the extent Applicant's grounds 1-15 are based on an alleged violation of a state constitutional provision, state statute, or state case law, none of them are cognizable on habeas review, and they should all be denied.

TRIAL COUNSEL'S QUALIFICATIONS

(6) The Court appointed Lalon "Clipper" Peale, John Tatum, and Richard Franklin to represent Applicant at trial. Mr. Peale acted as first-chair counsel. Mr. Tatum acted as second-chair counsel and provided appellate support. Mr. Franklin acted as third-chair counsel. (WRR2: 187; WRR3: 31, 62, 76, 79, 99).

(7) Mr. Tatum also represented Applicant on direct appeal. *Cade,* 2015 Tex. Crim. App. Unpub. 156.

(8) At the time of Applicant's trial, all three of Applicant's attorneys were qualified and approved for first-chair appointment to death-penalty cases in the First Administrative Judicial District as required by article 26.052 of the criminal procedure code. In addition, Mr. Tatum was qualified to represent death-penalty defendants on direct appeal. (WRR2: 183-87; WRR3: 52-56, 99-102; Applicant's Exs. 4, 8, 10).

(9) All three of Applicant's trial counsel were and are experienced criminal trial attorneys. And Mr. Tatum is an experienced appellate attorney who has handled a substantial number of death-penalty and non-death penalty appeals during his career. (WRR2: 182-84, 258-59; WRR3: 52-56, 74-77, 98-99, 120-21).

(10) Mr. Peale has been licensed in Texas since 1991. In addition to Applicant, Mr. Peale has represented other death-penalty defendants as both first and second-chair counsel. (WRR2: 182, 186).

(11) Mr. Tatum has been licensed since 1974. He has represented numerous capital murder defendants who were being tried for the death penalty and has handled the direct appeal proceedings in numerous death penalty cases as well. (WRR3: 74-77).

(12) Mr. Franklin has been licensed since 1973. He has represented numerous capital-murder defendants who were being tried for the death penalty. (WRR3: 98-99, 120).

(13) Based on their experience, education, and expertise, Mr. Peale, Mr. Tatum, and Mr. Franklin were qualified to formulate and execute an effective trial

strategy for Applicant.

GROUND 1: Counsel's Handling of Applicant's Insanity Defense

In ground 1, Applicant contends counsel rendered ineffective assistance in their insanity investigation, their decision to pursue an insanity defense, and their presentation of an insanity defense. (Application, pp. 31-44).

(14) 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 must prove by a preponderance of the evidence that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999) (explaining the standard under *Strickland*).

(15) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in trial counsel's investigation into insanity, decision to pursue an insanity defense, or presentation of the insanity defense.

(16) Even assuming counsel's investigation, decision to pursue, or presentation of the insanity defense was deficient, Applicant fails to demonstrate by a preponderance of the evidence any resulting prejudice.

Investigation Not Deficient

(17) Applicant claims counsel waited too long before beginning their investigation into the insanity defense and gave notice of the defense before obtaining evidence to support it. As a result, counsel was left in the "awkward" position of being just days away from trial with all three of their experts (Drs. Clayton, Flynn, and Fallis) opining that Applicant was not insane at the time of the offense. (Application, pp. 36-39).

(18) Applicant mischaracterizes the defense team's investigation into the insanity defense.

(19) In actuality, counsel began pursuing an insanity defense very early on in their representation. Contrary to Applicant's assertion, the investigation did not begin at the outset of individual voir dire proceedings. It began months earlier, on March 31, 2011, the day Mr. Peale and Mr. Tatum were appointed to Applicant's case. On that very day, Mr. Peale went to the jail and interviewed Applicant. (State's Writ Ex. 1)(entry dated 03/31/2011 08:49 PM CDT).

(20) During that interview, Applicant told Mr. Peale

> that he set up a video recorder and it caught his girlfriend talking on skype with her ex-husband in a sexual manner. he lost it. she had threatened him with a knife months before, and he just did what she did but got out of control, daughter came in to help mom and he lost it with her too.

(State's Writ Ex. 1)(entry dated 03/31/2011 08:49 PM CDT)(grammatical errors in original).

(21) On that very same day, Mr. Peale hired Dr. Kristi Compton, an experienced clinical and forensic psychologist and mitigation specialist, and "asked her to see [Applicant] for possible insanity defense or sudden passion." (WRR2: 125, 259); (State's Writ Ex. 1)(entry dated 03/31/2011 08:49 PM CDT). Mr. Peale hired Dr. Compton because she was experienced at evaluating for insanity and competency and, thus, could assess the viability of these defenses at the beginning of their representation. (WRR2: 207-08).

(22) The day after that, Mr. Peale drafted a motion for expert funding and conferenced with Dr. Compton about visiting Applicant. The Court granted the funding request four days later. (State's Writ Ex. 1)(entries dated 04/01/2011 05:08 PM CDT and 04/05/2011 05:01 PM CDT).

(23) On June 29, 2011, the State notified Mr. Peale that the decision had been made to seek the death penalty. That day, Mr. Peale relayed this information to his co-counsel, Mr. Tatum, and Dr. Compton. He also conferenced with Dr. Compton about the need to "look further into psych issues." (State's Writ Ex. 1)(entry dated 06/29/2011 03:10 PM CDT).

(24) In furtherance of an insanity defense, counsel sought out the services of and ultimately employed numerous psychological experts.

(25) The theory on which the insanity defense was premised was developed over a period of time through information obtained from various records, interviews with family members, and the expertise of numerous psychologists and a psychiatrist.

(26) The investigation began with an evaluation of Applicant by Dr. Compton, herself, more than a year before trial. (WRR2: 125-27).

(27) Dr. Compton first met with and interviewed Applicant on April 7, 2011. (State's Writ Ex. 3) (Compton's handwritten interview notes dated 4/7/11). She interviewed Applicant again on May 12, 2011. (State's Writ Ex. 3) (Compton handwritten interview notes dated 5/12/11). And a couple of weeks later, she administered the MMPI and scored the Hare Psychopathy Checklist to determine whether psychopathy would be an issue. (WRR2: 126-27); (State's Writ Ex. 4)(Compton email to counsel dated 5/20/11 at 11:05 AM). *See also* (WRR2: 45-49).

(28) In early November 2011, Dr. David Self agreed to evaluate Applicant for insanity and sudden passion. (State's Writ Ex. 4)(Compton email to counsel dated 11/08/11 at 12:00 PM). However, in the end, the defense team did not utilize him. (WRR2: 134-35).

(29) Early in 2012, the defense team also began interviewing family members about Applicant's history and how it might impact a defensive theory based on a mental illness. (State's Writ Ex. 1) (entries dated 01/19/2012 04:56 PM SCT, 02/01/2012 03:21 PM CST, and 03/26/2012 09:41 PM CDT).

(30) In February 2012, the defense team began collecting various records that might have a bearing on the defense, namely, medical records, prison records, employment records, current jail records, prior legal history, and school records. (State's Writ Ex. 1) (entries dated 02/10/2012 02:52 PM CST and 02/24/2012 04:21 PM CST).

(31) Also, in early February 2012, Mr. Peale and Dr. Compton discussed the potential for a defense of "temporary" insanity. (State's Writ Ex. 1)(entry dated 02/01/2012 03:21 PM CST). Later that month, Dr. Compton contacted Dr. Mitchell Dunn about assisting with the defense. But after Dr.

Compton described the offense to him, Dr. Dunn told her that he did not think he would be of much help. (State's Writ Ex. 4) (Compton emails to counsel dated 2/10/12 at 12:44 PM and 3:48 PM).

(32) On March 27, 2012, the defense team hired Dr. Antoinette McGarrahan, a neuropsychologist, to conduct a neuropsychological exam on Applicant. Dr. McGarrahan confirmed that she could see Applicant in early July 2012. (State's Writ Ex. 1)(entry dated 03/27/2012 03:15 PM CDT). After her evaluation, Dr. McGarrahan opined that Applicant's intellectual functioning fell within the borderline or low-average range, that he was depressed, that he reported symptoms of PTSD, and that his ability to process information was mildly impaired. (RR47: 92, 95-96).

(33) On April 17, 2012, the defense team discussed hiring Dr. Lisa Clayton, a board certified psychiatrist, to conduct an insanity evaluation. (State's Writ Ex. 1)(entry dated 04/17/2012 6:36 PM CDT). The defense team hired Dr. Clayton for this purpose two days later. (WRR2: 79-81, 226); (State's Writ Ex. 4)(Compton email exchange with Candi Dickey dated 4/19/2012).

(34) Dr. Clayton was scheduled to conduct the evaluation in early May 2012, but she did not evaluate him until early June 2012. (State's Writ Ex. 1)(entry dated 07/09/2012 10:14 PM CDT); (State's Writ Ex. 4)(Compton email exchange with Candi Dickey dated 4/19/2012). On August 9, 2012, she informed the defense of her opinion that Applicant was not insane at the time of the offense. (Defense Writ Ex. 40).

(35) In May 2012, counsel and Dr. Compton discussed obtaining an expert on the effects sexual abuse can have on a person's emotional and psychological development. (State's Writ Ex. 3) (Compton notes regarding conversation with Peale on 5/23/12). In early June 2012, counsel hired another psychologist, Dr. Michael Gottlieb, to address the effects sexual abuse may have had on Applicant. (State's Writ Ex. 1)(entries dated 06/06/2012 10:26 PM CDT and 06/19/2012 07:59 PM CDT).

(36) In June 2012, counsel also obtained an MRI and an expert to interpret the results. The MRI revealed nothing of significance. (WRR2: 135). (State's Writ Ex. 1)(entries dated 06/06/2012 10:26 PM CDT and 06/10/2012 10:07 PM CDT). The defense also considered an fMRI, but after additional research, Dr. Compton had concerns about its reliability and recommended

against it. Counsel agreed with Dr. Compton and did not pursue fMRI further. (WRR2: 136-37).

(37) Based on the foregoing and her own research, Dr. Compton formed an opinion about a potential insanity defense, which she communicated to counsel by email on June 9, 2012. (WRR2: 74-77). In particular, she opined:

> [Applicant's] behavior at the time of the offense can be explained by an emotional hijacking in which rage overtook rational thought processes and diminished behavior control. The physiology behind this phenomenon involves the primitive part of the emotional brain being overly activated (called the limbic system) which renders the neocortex (the rational thinking part of the brain) paralyzed. Thus, the person is acting on pure emotions without really processing their behavior. Emotional hijacking happens to all of us to some degree. For example people frequently report that during arguments with spouses they lose control and say things they do not mean. In extreme cases of emotional hijacking aggression can occur. Usually the person has been under increasing stress and is feeling threatening [sic]. There is no doubt that [Applicant] had been suspicious that Mischell was having an affair and Desaree repeatedly taunted him that he would be "put out of the house." The final event was listening to the interactions between Mischell and her ex. Thus, it is truly a sudden passion offense which rendered him temporarily insane. I have contacted two psychologists in Dallas (Dr. Lynn and Dr. Branneman) who may be able to testify about this issue. Dr. Flynn has already responded and is interested. I will set up a meeting with him to assess if he really knows the research. I am also meeting with psychiatrist from Tenn. on Monday (Dr. Bailey) and will talk to him about his ability to assist as well.

(State's Writ Ex. 1) (entry dated 06/19/2012 08:17 PM CDT).

(38) In furtherance of an insanity theory premised on abandonment rage and amygdala hijacking, the defense hired additional experts.

(39) Counsel hired Dr. William Flynn. Initially, counsel had considered hiring Dr. Flynn as an expert on aggression in humans and animals. (State's Writ Ex. 1) (entry dated 06/11/2012 10:59 PM CDT). On June 19, 2012, however, counsel decided to have Dr. Flynn interview Applicant for abandonment rage and amygdala hijacking. (WRR2: 219-20, 249-51); (State's Writ Ex. 1) (entry dated 06/19/2012 10:07 PM CDT). Dr. Flynn recorded the interview, during which Applicant reenacted the victims' screaming while he was stabbing them. Because this recording may have come to light if Dr. Flynn testified on Applicant's behalf, counsel chose not to utilize him further. (WRR2: 141-42); (State's Writ Ex. 1) (entry dated 07/06/2012 10:27 PM CDT).

(40) In early July 2012, the defense hired another forensic psychologist, Dr. Emily Fallis, to evaluate Applicant for "sudden passion" and other possible mitigating mental-health issues. (State's Writ Ex. 4) (Compton email to counsel dated July 6, 2012 at 11:49 PM).

(41) On July 23, 2012, Dr. Fallis reported to Dr. Compton her conclusion that Applicant was not insane at the time of the offense. (State's Writ Ex. 3)(Compton's notes re: conversation with Fallis on 7/23/12). She reiterated this conclusion to Dr. Compton on July 31, 2012. (State's Writ Ex. 3)(Compton's notes re: conversation with Fallis on 7/31/12).

(42) Counsel hired another psychologist, Dr. Daniel Altman, to address the likelihood of Applicant inheriting a mental disease or defect based on his family history of mental illness. It is unclear exactly when the defense hired Dr. Altman, but it would have been no later than August 3, 2012. (RR46: 134-36); (WRR2: 232-33); (State's Writ Ex. 1) (entry dated 08/03/2012 09:52 PM CDT).

(43) Finally, counsel enlisted Dr. Gilda Kessner to assist in the insanity defense. Although initially hired by the defense to address the risk Applicant posed in prison, the defense chose to cultivate her as an educational expert on abandonment rage instead. Counsel did not send her in to personally evaluate Applicant or render a professional opinion as to whether Applicant was, in fact, insane at the time of the offense. (WRR2: 98-100, 234-35); (State's Writ Ex. 1) (entry dated 02/10/2012 10:19 PM CST).

(44) As the foregoing demonstrates, counsel's investigation into an insanity defense was timely initiated, diligently pursued, and thorough. It certainly fell within reasonable professional norms and was not deficient.

Decision to Present Insanity Defense Not Deficient

(45) In the end, counsel decided to present an insanity defense. In particular, counsel theorized that Applicant was insane when he murdered Mischell and Desaree. Alternatively, counsel theorized that Applicant may have been sane when he murdered Mischell, but he was insane when he murdered Desaree. (RR48: 206-07, 217-19); (WRR2: 73, 131).

(46) Counsel chose to present this theory through the testimony of Applicant's brother, Greg Scott, and four experts – Drs. Altman, Gottlieb, McGarrahan, and Kessner. (WRR2: 72).

(47) This insanity theory was based on the mental disease or defect of abandonment rage. In more explicit terms, the defense theorized that Applicant had been abandoned and abused in childhood and was extremely dependent on Mischell. Thus, when she threatened to end their relationship, Applicant experienced an overwhelming fear that morphed into uncontrolled rage and the need to protect himself. (WRR2: 75-76); (RR48: 14-18).

(48) Applicant claims this insanity theory was not the integrated, persuasive, and understandable theory mandated by the ABA Guidelines. He argues that counsel should have "changed course" once they learned that no defense expert would opine that he was insane at the time of the offense. He characterizes counsel's choice to proceed with the insanity defense as "objectively unreasonable."

(49) Applicant erroneously asserts that counsel was forced to proceed with the insanity defense. (Application, p. 38). Counsel was not obligated by their notice of the intent to pursue an insanity defense. Counsel could have chosen to abandon it before trial started. Counsel put considerable thought into the decision to pursue the defense and chose to proceed with it because they believed it to be a good choice. (WRR2: 262).

(50) Although the experts who personally evaluated Applicant for insanity at the time of the offense (Drs. Clayton and Fallis) ultimately opined that

Applicant was not insane, counsel still had sound strategic reasons for pursuing the defense.

(51) The facts and circumstances surrounding the offense supported a mental health defense. (WRR2: 133).

(52) The attacks on both victims could be characterized as "overkill" or rage motivated, and Applicant's repeated sexual assaults of Mischell during the knife attack and after her death were disturbing.

(53) Moreover, after the offense, Applicant exhibited suicidal thoughts and behavior, turned himself in to the police, and confessed to the murders, claiming that he "just went off the chain" and it "got out of control." (State's Ex. 131, 131A).

(54) By employing an insanity defense in the guilt/innocence phase, the defense was able to utilize the horrible facts of the crime to Applicant's benefit. Moreover, by presenting the insanity theory, the defense could "frontload mitigation," meaning that the mental-illness evidence, which normally might be reserved for punishment, would be presented in the guilt phase first. (WRR2: 131-33, 262-64; WRR3: 82, 123-25).

(55) The benefit of frontloading mitigation is that the jury hears the defense's mitigating evidence throughout the entire trial, not just at punishment. By hearing the evidence early and repeatedly, it was more likely to impact the jury's punishment verdict. (WRR2: 131-32). This is a strategy recommended at capital-defense continuing legal education seminars. (WRR3: 82, 123).

(56) Furthermore, counsel was not hamstrung by the lack of an expert opinion that Applicant was insane at the time of the offense. Insanity may be established through lay witness testimony alone. *Pacheco v. State*, 757 S.W.2d 729, 736 (Tex. Crim. App. 1988). Moreover, the burden of proof is only by a preponderance of the evidence. *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008). Thus, Applicant's insanity defense was a viable one.

(57) The insanity defense also had the added benefit of providing Applicant with a jury that was more favorable to his defense.

(58) First, to qualify, the jurors had to be able to follow the law on insanity. A juror qualified on insanity is not told what happens to someone found not guilty by reason of insanity. Thus, a juror could well believe that such a verdict would result in Applicant walking out of the courtroom a free man A juror who believed this but was still capable of finding someone not guilty by reason of insanity would necessarily be more favorable to the defense. (WRR2: 133; WRR3: 125-26).

(59) Second, to qualify, the jurors must to be able to find someone not guilty by reason of insanity on the testimony of a lay witness alone if they felt it proved insanity by a preponderance of the evidence. But they must also be willing to consider mental health evidence. Normally, jurors need not be willing to give mitigating effect to any particular kind of evidence to qualify. Thus, by raising an insanity defense, Applicant ended up with a jury more likely to give mitigating effect to his mental illness evidence. (WRR: 133, 262-63; WRR3: 82-83).

(60) Third, it would be more difficult for the State to qualify strong State's jurors if the jurors had to be qualified on insanity, as individuals who favor the death penalty are more likely to be unmoved by evidence of a defendant's psychological issues. (WRR2: 262).

(61) Counsel rightly concluded that such an insanity-qualified jury would be more favorable to Applicant.

(62) Also, the insanity defense, if proven, would save Applicant's life. If the jury found Applicant was insane during both murders, he would be acquitted. If the jury found that Applicant was only insane at the time of Desaree's murder, then Applicant could not be convicted of capital murder. Either way, he could no longer receive the death penalty. (WRR2: 131) (State's Writ Ex. 1)(entry 07/24/2012 11:10 PM CDT).

(63) Even if the defense could not convince the entire jury that Applicant was insane, if they convinced one juror, the jury might hang in the guilt/innocence phase, again, saving Applicant's life, albeit temporarily. (WRR2: 266).

(64) Also, counsel was concerned that the jury would expect and prefer the defense to put up some fight in the guilt/innocence phase, rather than concede guilt. This was a legitimate concern. (WRR3: 261; WRR3: 127).

(65) Finally, Applicant wanted counsel to pursue and present an insanity defense, and he agreed with the strategy, especially with regard to Desaree. He conveyed this to the defense team and Brandy Besio. As counsel put it, Applicant wanted something to be wrong with him. (WRR2: 260; WRR3: 127).

(66) Based on the foregoing, counsel's decision to proceed with the insanity defense fell within reasonable professional norms and was not deficient.

Presentation of Insanity Defense Not Deficient

(67) Applicant contends "counsel failed to use the information they acquired to craft a persuasive and understandable theory." He argues that it was unreasonable to rely on Dr. Kessner's testimony because she had not personally evaluated Applicant. Also, he argues that counsel should not have offered Greg Scott's testimony because he was not present at the time of the offense. (Application, p. 40).

(68) Applicant does not accurately describe the case for insanity that counsel presented.

(69) The theory was not premised only on Mr. Scott's and Dr. Kessner's testimony. Counsel also offered the testimony of Drs. Gottlieb and Altman; counsel also attempted to offer the testimony of Dr. McGarrahan, but the Court excluded it.

(70) Greg Scott, Applicant's oldest brother, testified that he believed Applicant was emotionally unstable at the time of the offense. In his opinion, at the time Applicant stabbed Mischell and Desaree, he suffered from a severe mental defect and did not know that what he was doing was wrong. Further, Mr. Scott explained, "In our family we say that our bloodline is crazy, we have crazy bloodline." (RR46: 99-100, 133).

(71) Following Mr. Scott's testimony, counsel planned to present Drs. Gottlieb, Altman, McGarrahan, and Dr. Kessner to establish that Applicant suffered

from a mental disease or defect. All but Dr. McGarrahan ended up testifying.

(72) Dr. Altman testified about the likelihood that Applicant suffered from a mental disease or defect. He reviewed 1400 pages of mental health records pertaining to Applicant's father, Jerry Cade, and he researched the heritability of schizophrenia or schizoaffective disorder among first-degree relatives. He opined that there was a nine to eighteen percent risk that a first-degree relative of someone with schizophrenia or schizoaffective disorder would also demonstrate characteristics of the illnesses. (RR46: 134-36).

(73) Dr. Gottlieb testified about the psychological problems a sexually-abused child can develop as a result of the abuse. He opined that such children can suffer from PTSD, depression, insecurity and difficulty trusting in intimate relationships, low self-confidence, and feelings of shame. Abused children without good family support are less able to cope with the abuse. That lack of support in conjunction with a vulnerability to certain mental or emotional disorders may lead a child to develop bipolar disorder and "various forms of problem with their thinking or what we would call psychosis." More specifically, Dr. Gottlieb explained "they can distort information that they're receiving from the environment and sometimes act on it in destructive ways," and that "they overestimate behavior that we might not necessarily view as being threatening that they would." (RR47: 48-54).

(74) Dr. McGarrahan planned to testify that based on her neuropsychological evaluation of Applicant, he suffered from a borderline to low-average intellectual functioning. According to Dr. McGarrahan, Applicant was mildly impaired in the way he processes information. Furthermore, he reported symptoms of PTSD, and there was evidence that he was suffering from depression. (RR47: 89-97). Dr. McGarrahan's testimony, however, was excluded by the Court. (RR47: 43-45).

(75) Counsel offered Dr. Kessner's testimony for educational purposes only, namely, to explain the concept of abandonment rage and how it could render someone insane. (WRR2: 99-100). Consistent with this plan, Dr. Kessner testified that abandonment rage is "an uncontrolled emotion that has its origins in early childhood where the parents are either maltreating a

child or there's a lot of conflict in the family which makes the environment unsafe for the child and so emotionally they're unable to regulate their feelings. And when they feel that the person that they depend on is going to leave them, they go into a rage." (RR48: 39). Some children grow out of it, "[b]ut some who have maybe low intellectual functioning or the family is particularly chaotic then it may continue, especially if there are many problems in the family." (RR48: 40).

(76) Dr. Kessner also explained that a person in a state of abandonment rage loses "volitional control of their behavior." Rational thinking ceases because there is an intense autonomic arousal brought on by fear from a perceived threat to one's internal self. Various stressors could trigger such a state, such as loss of job, loss of home, and divorce. (RR48: 40-44). And someone who experienced abandonment range would not know that their conduct at the time was wrong. (RR48: 46).

(77) Dr. Kessner then went on to opine that the report of the State's forensic psychologist, Dr. Timothy Proctor, documenting his personal evaluation of Applicant for insanity reflected numerous stressors and a propensity toward abandonment rage. (RR48: 44-46).

(78) The preceding reflects a thoughtfully constructed, viable insanity defense.

(79) Furthermore, counsel utilized the evidence developed in support of the insanity theory to bolster their punishment defense, thus integrating the defensive theories in the guilt/innocence and punishment phases.

(80) Specifically, counsel relied on the insanity evidence to argue that the offense was not planned or premeditated. Rather, counsel characterized the offense as one triggered by environmental stressors in a psychologically-damaged man. Counsel argued that Applicant's difficult childhood and mental-health issues were mitigating factors. And counsel presented Applicant as a damaged man who would not pose a future danger to anyone in the controlled environment of prison. (WRR3: 131-32); (RR51: 77-104).

(81) Although Dr. McGarrahan's testimony was excluded, counsel still presented a cogent and viable insanity defense.

(82) The main purpose of Dr. McGarrahan's testimony was to establish Applicant's borderline to low-average intellectual functioning. Dr. McGarrahan's assessment of Applicant's intellectual functioning came in through the State's expert, Dr. Proctor, on cross-examination. Moreover, Dr. Proctor conceded on cross-examination that people with low intellectual function can have diminished coping skills, which can impact depression. Thus, counsel was able to introduce Dr. McGarrahan's opinion by other means. (WRR2: 96-97); (RR48: 157-58).

(83) Applicant claims Mr. Scott's and Dr. Kessner's testimony was a liability.

(84) He points out that Dr. Kessner ultimately offered an opinion that Applicant was insane at the time of the offense, notwithstanding the fact that she had not personally evaluated him. (RR48: 87-88)

(85) Applicant also points to his brother's testimony that the photograph of Mischell's injuries reflected "what any man probably [sic] do to a woman that he finds cheating on him." (RR46: 123).

(86) Counsel did not plan to offer Dr. Kessner's professional opinion on whether Applicant was, in fact, insane at the time of the offense. Counsel purposely did not send Dr. Kessner in to personally evaluate Applicant. Applicant had been giving accounts to some of the defense experts that conflicted with the insanity defense, perhaps in an attempt to sabotage his own defense. Consequently, counsel planned to limit Dr. Kessner's testimony to educating the jury about abandonment rage. In furtherance of this plan, Dr. Compton and counsel carefully prepared Dr. Kessner to testify. On direct examination, Dr. Kessner testified consistently with this plan. (RR2: 137-38).

(87) On cross-examination, however, Dr. Kessner erroneously opined that Applicant was insane at the time of the offense. This was a mistake on her part, given that she had not personally evaluated Applicant. The mistake was likely the product of becoming flustered on the stand. It was not something counsel anticipated and, in fact, it was something that they had guarded against by taking care in preparing her to testify. (WRR2: 139).

(88) Notwithstanding the mistake, Dr. Kessner's testimony still supported the insanity defense. Dr. Kessner's testimony still educated the jury on

abandonment rage, what can trigger it, and how it affects rational thought processes.

(89) Moreover, her "opinion" testimony did not create any new problem with the insanity defense. No defense expert who personally evaluated Applicant for insanity had found him insane. That fact existed before Dr. Kessner took the stand and would have existed even absent her opinion testimony. In other words, the State could and would have challenged her testimony based on her lack of personal evaluation of Applicant, regardless of her mistake.

(90) As for Mr. Scott, counsel acknowledged that the defense team had some reservations about him testifying. Thus, the defense team spent a good deal of time preparing him for trial and expected him to perform better than he did. He turned out, however, to be a loose cannon. (WRR2: 139-40).

(91) Nevertheless, counsel turned Mr. Scott's prejudicial statement to their benefit by arguing that it was illustrative of Applicant's family's unhealthy psyche. In particular, counsel argued

> You know, [the prosecutor] wants to get up here and tell you that the only evidence is Gregory Scott, that's the only one they have saying this. That's not true. There's tons of evidence. And on top of that, I say Gregory Scott's demeanor on this stand is a perfect example of what we're talking about with this family. And that's just the Scott bloodline, the crazy Scott bloodline. That's not the Cade bloodline. You take all that together. You look at all this.

(RR48: 203)

(92) Applicant argues that the psychological evidence available to the defense was sacrificed in the guilt phase because the jurors rejected it when they decided against Applicant on the insanity defense. But the evidence did not necessarily lose any mitigating value when the jury rejected the insanity defense. The jurors could have believed that he suffered from some mental illness or deficiency, but that it simply did not rise to the level of insanity.

(93) Applicant also argues that counsel lost credibility with the jury by presenting a weak insanity defense. Applicant fails to acknowledge the viability of the defense. He also fails to recognize that jurors may expect the defense to "put up a fight" in the guilt phase, even against overwhelming odds.

(94) Applicant presents the affidavit and testimony of Mr. Philip Wischkaemper in support of his contention that counsel was deficient in their investigation, decision to pursue, and presentation of the insanity defense.

(95) Mr. Wischkaemper is an experienced criminal defense attorney with an expertise in capital defense work. His opinion of counsel's performance, however, is not well founded.

(96) Mr. Wischkaemper did not speak to trial counsel in forming his opinion. He did not thoroughly review Mr. Peale's unredacted billing notes and he was not present for Dr. Compton's testimony; he saw only part of Mr. Peale's testimony in the writ proceedings. (WRR3: 174, 190-91, 214-16). Thus, he was operating from a deficit of information about the effort put into developing the defense and the factors that affected counsel's decision to pursue and present it.

(97) Furthermore, Mr. Peale, Mr. Franklin, and Dr. Compton have all experienced success with the insanity defense; Mr. Wischkaemper has not. (WRR3: 122).

(98) Also, Mr. Franklin and Mr. Tatum have significantly greater experience trying death penalty cases than Mr. Wischkaemper. (WRR3: 211-12, 226-7).

(99) Lastly, one of Mr. Wischkaemper's colleagues, Mr. John Niland, another experienced criminal defense attorney with an expertise in capital defense work, solicited Mr. Franklin to give a presentation on frontloading mitigation in a capital defense seminar before Applicant's trial. Thus, another legal expert of Mr. Wischkaemper's caliber has recognized the skill of Applicant's counsel in formulating an effective trial strategy in a death penalty case. (WRR3: 123-24).

(100) At best, Mr. Wischkaemper's opinion demonstrates only that other counsel may have tried Applicant's case differently.

(101) In sum, counsel presented a rational theory of insanity supported by both expert and lay witness testimony.

(102) The insanity defense crafted and presented by counsel was not deficient and fell within reasonable professional norms.

Defense Suffered No Prejudice From Insanity Defense

(103) Lastly, Applicant's defense was not prejudiced by his insanity defense.

(104) As previously noted, pursuit of the insanity defense benefitted him in multiple ways. He was able to frontload his mitigation evidence, obtain a more favorable jury, and utilize the terrible facts of the crime in his defense.

(105) Applicant argues that the outcome of his trial would have been different if counsel had not pursued and presented the insanity defense.

(106) He contends counsel should have conceded guilt, i.e., "pled guilty to the offense and proceeded to have a punishment-only trial." Alternatively, he argues that counsel should have used expert testimony to "negate or rebut the culpable mental state," i.e., presented a "diminished capacity" defense. (Application, pp. 40-41, fn. 6).

(107) Both of these options had their own problems, however.

(108) Conceding guilt was problematic because Applicant was denying guilt. As counsel noted, Applicant wanted something to be wrong with him. Also, conceding guilt might play poorly to a jury expecting the defense to "put up a fight," especially in a death penalty case. And unlike insanity, conceding guilt would result in a conviction and it would not take the death penalty off the table. (WRR3: 126-28).

(109) If counsel had opted to concede guilt, they were just as likely to face a post-conviction challenge to their strategic choice.

(110) Diminished capacity would not offer the jury the alternative of conviction on a lesser-included offense, unlike a finding of insanity with regard to the murder of Desaree. Moreover, it provided no benefits that the insanity defense did not, i.e., front-loading mitigation, etc.

(111) More importantly, the State's case against Applicant was overwhelming. The offense was particularly disturbing and heinous, and Applicant had a history of violence towards women. Also, his psychological issues could easily be interpreted as aggravating, rather than mitigating, factors.

(112) No matter which defensive theory counsel chose, they faced an uphill battle. Counsel's choice to pursue a defense other than insanity would not have improved their odds of success.

(113) Trial counsel's investigation into insanity, decision to pursue the defense at trial, and presentation of the defense did not prejudice Applicant's defense.

(114) Applicant's trial counsel rendered effective assistance of counsel. There was no constitutional violation.

(115) Ground 1 should be denied.

GROUND 2: Counsel's Investigation and Presentation of Mitigating Evidence

In ground two, Applicant contends counsel rendered ineffective assistance by failing to investigate and present mitigating evidence. Specifically, Applicant claims counsel should have interviewed and presented the testimony of his daughter, Tyra Cade, to show that Applicant was a good father and to ask the jury to spare his life. Also, he claims counsel should have interviewed and presented various witnesses to testify about his early life, his middle school years, and his life in the period leading up to the capital murder. As a result of these omissions, Applicant claims, the jury lacked a complete picture of him and his life. (Application, pp. 44-59).

(116) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in trial counsel's investigation and presentation of mitigating evidence.

(117) Even assuming counsel's investigation and presentation of mitigating evidence was deficient, Applicant fails to demonstrate by a preponderance of the evidence any resulting prejudice.

Tyra Cade

(118) Applicant contends counsel failed to interview his daughter, Tyra. He claims Tyra was only mentioned in passing during trial and that "her love for her father and positive relationship with him" was never presented to the jury. Applicant claims Tyra's testimony "would have undoubtedly pulled at the emotions of the jury" if she had asked them to spare Applicant's life.

(119) In support of this contention, Applicant presents Tyra's affidavit. In the affidavit, Tyra describes her close relationship with Applicant, the various activities they did together, and the things he did for her over the years. Also, Tyra describes Applicant as a great dad, a people person, and a family man. (Applicant's Ex. 10).

(120) As Applicant asserts, the defense team did not interview Tyra or call her as a witness.

(121) At the time, Tyra was only 11-12 years old, and her mother, Brandy Besio, would not allow the defense team access to her. Furthermore, Applicant did not want them interviewing her. Neither parent wished to put Tyra through the difficult experience of being questioned and testifying in Applicant's trial. Applicant particularly did not want Tyra to suffer from her association with him. Also, counsel feared that during the course of testifying, Tyra might learn that Applicant had stated that he would have killed her, too, if she had been present during the offense. (WRR2: 147-48; WRR3: 22-23).

(122) Even assuming counsel had obtained access to Tyra, it is questionable that she would have testified favorably to his defense. Although she did execute an affidavit on his behalf in these writ proceedings, at the time of the writ hearing, she had ceased communicating with him. (WRR4: 79-80).

(123) Even if Tyra had been willing to testify, the Court could have properly excluded her testimony.

(124) The mitigation special issue is premised on the belief that a defendant whose criminal acts are attributable to such factors as a disadvantaged background, or to emotional or mental problems, "may be less culpable than defendants who have no such excuse." *Rhoades v. State*, 934 S.W.2d 113, 126 (Tex. Crim. App. 1996). To the extent Applicant is claiming that

Tyra should have testified about his character as a good father, such testimony was irrelevant to Applicant's moral blameworthiness for the gruesome murders of Mischell and her daughter. *Cf. id.* (holding evidence of the defendant's happy childhood was irrelevant to mitigation because such evidence had no relationship to the defendant's conduct in the capital murder).

(125) To the extent Applicant is claiming that Tyra should have been allowed to testify about her love for him and her desire for him to live, such testimony was also inadmissible.

(126) Mitigating evidence must relate to the defendant's *own* circumstances and personal moral culpability. *See Tennard v. Dretke*, 542 U.S. 274, 284 (2004); *see also Joubert v. State*, 235 S.W.3d 729, 734 (Tex. Crim. App. 2007). The effect of Applicant's sentence on Tyra pertains solely to Tyra's circumstances. It does not relate to Applicant's own personal moral culpability and is, thus, not relevant to mitigation. *See, e.g., Gallo v. State*, 239 S.W.3d 757, 778-79 (Tex. Crim. App. 2007) (holding that evidence of the impact of the defendant's execution on his family and friends is not relevant to mitigation); *Fuller v. State*, 827 S.W.2d 919, 935-36 (Tex. Crim. App. 1992) (rejecting defendant's complaint that character evidence from relatives concerning their love for him and their desire to see him live constitute mitigating evidence).

(127) Furthermore, evidence that depends on mere sympathy or emotional response should not be considered in the jury's determination of the defendant's deathworthiness. *Prystash v. State*, 3 S.W.3d 522, 534 (Tex. Crim. App. 1999).

(128) Counsel was not deficient for not offering inadmissible evidence.

(129) Furthermore, counsel's decision not to present Tyra's testimony constituted sound trial strategy.

(130) Counsel legitimately feared that presenting Tyra to the jury would allow the State to highlight Applicant's admission that he probably would have killed Tyra, too, if she had been present during the offense.

(131) And, counsel did not need to put Tyra on the stand to present evidence about Applicant's relationship with her.

(132) Applicant's half-brother Gregory Scott testified during guilt/innocence that Applicant always had a job so he could make sure Tyra had everything she needed. (RR46: 92).

(133) Applicant's friend and former coworker, James Kemp, testified during punishment that he and his children once went to Mischell and Applicant's house for Tyra's birthday party. (RR50: 58-59). Kemp testified that Applicant appeared to be a good father to Tyra. (RR50: 60).

(134) Applicant's cousin Rhea Scott testified during punishment that Applicant was a good father to Tyra and was also good with her children. (RR51: 34). Applicant had a great relationship with Tyra and "loved her to death." (RR51: 35).

(135) Thus, through other witnesses, counsel established that Tyra had a positive relationship with Applicant.

(136) Moreover, the positive nature of their relationship was undisputed at trial.

(137) Additional details from Tyra about their relationship would have been of little benefit to Applicant's defense and would have made no difference in the jury's verdict on punishment.

(138) For the foregoing reasons, counsel's decision not to interview or present testimony from Tyra Cade was not deficient and, alternatively, did not prejudice Applicant's defense in the punishment phase.

Applicant's Early Life

(139) Applicant contends evidence of his early life was incomplete because counsel failed to present evidence of the abusive relationship between his parents, his mother's drug and alcohol abuse, his regular exposure to drug use by other family members, and the arrangements that frequently had to be made for his care because of the neglect of his mother. (Application, pp. 49-52).

(140) Applicant claims counsel could have presented this evidence through the following witnesses: (1) Jerry Scott, (2) Karl Rogers, (3) Debora Tennell, (4) Carolyn Singley, (5) Mary Rogers, and (6) Rhea Scott. According to Applicant, the defense team never interviewed or presented the first four

individuals. He claims the team interviewed but did not present Mary Rogers. He claims counsel presented Rhea Scott as a witness but failed to elicit from her sufficient mitigating details about his early life.

Investigation into Early Life Not Deficient

(141) Counsel's mitigation investigation into Applicant's early life was not deficient.

(142) The defense team made reasonable efforts to contact Karl Rogers, Deborah Tennell, and Carolyn Singley.

(143) Dr. Compton contacted Karl Rogers the same day she interviewed his mother, Mary Rogers. She planned to interview him as well, but that plan changed because Karl was too impaired at the time to be interviewed. He appeared to be intoxicated from drug use. This made Dr. Compton concerned about his overall ability to be a good witness. (WRR2: 146-47).

(144) The decision not to pursue Karl Rogers further as an informant or witness fell within reasonable professional norms. His substance abuse and intoxication made him an unreliable informant and a risky witness.

(145) The defense team identified Debora Tennell as a person of interest and attempted to contact her, but they were unable to reach her. (WRR2: 147); (State's Writ Ex. 3).

(146) Defense investigator Cliff Jenkins attempted to reach Carolyn Singley. He was able to locate a relative named Ed Singley, who confirmed that Carolyn was alive and well. Mr. Singley agreed to give Carolyn Dr. Compton's office number so that she could contact her directly. Carolyn never called Dr. Compton, however. (WRR2: 113-14; WRR3: 14-15); (State's Writ Ex. 4)(Compton and Jenkins email exchanges dated August 6, 2012, August 10, 2012, and August 13, 2012).

(147) As Applicant asserts, the defense team did not attempt to contact Applicant's brother, Jerry Scott. This decision was a strategic one. Mr. Scott was incarcerated in prison; consequently, the defense team believed his testimony would not benefit Applicant's defense. (WRR3: 22, 44).

(148) The decision not to pursue Jerry Scott as a witness fell within reasonable professional norms. Jerry Scott was not Applicant's only sibling; his brother Greg Scott was available to the defense team and providing them substantial information about Applicant's background. Moreover, Greg was not incarcerated and, thus, would not be testifying in prison garb and drawing attention to the family's criminal proclivities.

Decision Not to Present Mary Rogers Was Not Deficient

(149) As noted above, the defense team interviewed Mary Rogers but chose not to present her testimony at trial. This was a sound strategic decision because during her initial interview with the defense team, Mary "negated that there was anything really difficult in his childhood or that his mother had any difficulties with being physically or emotionally abusive." (WRR2: 146; WRR3: 19). This was consistent with Mary Rogers's testimony during the Grand Jury proceedings, which counsel learned of during discovery. (WRR3: 18-19); (State's Writ Ex. 7)(Mary Rogers's Grand Jury Testimony).

Decision to Limit Testimony of Rhea Scott Was Not Deficient

(150) The defense team interviewed Applicant's cousin Rhea Scott, prepared her for trial, and presented her testimony in the punishment phase. (State's Writ Ex. 1)(entries dated 08/20/2012 10:40 PM CDT, 08/27/2012 10:54 PM CDT, 08/29/2012 05:54 PM CDT); (RR51: 32-37).

(151) Counsel chose to limit her testimony to avoid the risk of additional, aggravating information coming to light through her. (WRR2: 140-41). As counsel documented in his billing notes, the defense team

> discussed Rhea Scott testimony and determined that she is a little risky we will have to see how testimony comes out since she states that client's assault against her dad was because her dad wanted to get drugs from client and client did not want him to get any drugs, problem is that jury does not know that client was a drug dealer and state has not given any notice of such and therefore it would be detrimental to client if jury finds this out.

(State's Writ Ex. 1)(entry dated 08/26/2012 09:58 PM CDT) (grammatical errors intact).

(152) Counsel's decision to limit Rhea's testimony fell within reasonable professional norms.

(153) Keeping out additional aggravating information, in particular about Applicant's other criminal activities, benefitted his defense. Moreover, the benefit in providing additional or more specific details about the neglect they suffered as children and the drug and alcohol abuse of their adult relatives was minimal.

Defense Not Prejudiced by Any Deficiency in Investigation and Presentation of Evidence Related to Applicant's Early Life

(154) Even assuming counsel's investigation into Applicant's early life was deficient, it did not prejudice his defense.

(155) First, Applicant's assertion that all of the complained-of witnesses would have been available and would have testified favorably in his defense is uncertain.

(156) On the date of their scheduled interview, Karl Rogers was present but intoxicated. Although Karl may have made himself physically present for trial, he may well have been rendered unavailable by showing up intoxicated.

(157) Moreover, Carolyn Singley never called the defense team back in response to their efforts to speak with her. This indicates that she was, in fact, reluctant to help Applicant's defense and would have made a less than persuasive witness.

(158) Second, as noted above, presenting testimony from Mary Rogers or additional testimony from Rhea Scott would have jeopardized, not helped Applicant's defense. Mary refuted the theory that Applicant's childhood was difficult and that his mother was abusive. And the more information elicited from Rhea, the more likely she was to reveal Applicant's drug dealing.

(159) Moreover, if counsel had called Jerry Scott to testify, he may have harmed Applicant's defense based on his reaction to learning the shocking details of the offense. During his testimony at the writ hearing, when he learned of the sexual assaults and the number of wounds, Jerry apologized to the victims' family sitting in the gallery. (WRR5: 72-76).

(160) Finally, most of the evidence Applicant contends the complained-of witnesses could have offered about Applicant's early life was introduced by other means.

(161) With regard to the abusive relationship between Applicant's parents, counsel presented the testimony of Applicant's half-brother, Greg Scott. Mr. Scott testified that Applicant lived with both parents and his brothers in the first few years of his life. (RR46: 78). During that time, the relationship between Applicant's parents, Bobbie and Jerry Cade, was abusive; Jerry frequently beat Bobbie. (RR46: 78-79). Mr. Scott recalled a time when Bobbie attacked Jerry Ford with a knife and a time when Jerry Ford attacked Bobbie with a hammer. (RR46: 81). Bobbie finally took the children and left Jerry Ford after the hammer incident. (RR46: 82).

(162) Evidence of his parents' abusive relationship also came in through Applicant's expert, Dr. Gilda Kessner, and the State's expert, Dr. Timothy Proctor. In particular, Dr. Kessner noted that Applicant had reported violence between his parents to Dr. Proctor during his evaluation of Applicant for insanity. (RR48: 45-46). Dr. Proctor's report, which was admitted, confirmed Applicant's account of his parents' violent relationship. Specifically, the report recounts Applicant's report to Dr. Proctor that his father attempted to kill his mother in his presence when he was three or four years old, that Applicant attempted to stop him, and that his mother was able to escape. (RR48: 112; State's Ex. 185, p. 3). Moreover, in his deposition, Applicant's father, Jerry Cade, admitted to hitting Bobbie on the head with a hammer and how Applicant witnessed this attack. (Defense Exs. 2, 2A).

(163) With regard to evidence of Applicant's mother's substance abuse, evidence was presented through Greg Scott that Bobbie abused alcohol and drugs. (RR46: 79-80).

(164) With regard to Applicant's exposure to drug abuse by others in the family, Greg Scott confirmed that Applicant's father also abused drugs and alcohol. Moreover, Dr. Proctor's report reflects that "available records note a history of crack cocaine abuse" by Applicant's father. (RR46: 79-80; State's Ex. 185, pp. 3-4).

(165) Outside of the complained-of witnesses' affidavits, there was no evidence about Applicant witnessing the heavy drug use of his uncles and other relatives. Evidence that, in addition to his parents, other adult relatives used drugs in Applicant's presence would have been of little benefit to Applicant's defense, however. This fact is minor in comparison to the drug and alcohol abuse Applicant witnessed in his own parents, and it is far less mitigating than the evidence of the neglect and abuse Applicant suffered.

(166) For the foregoing reasons, Applicant suffered no prejudice from counsel's decision not to present the complained-of witnesses' testimony.

Applicant's Middle and High-School Years

(167) Applicant contends counsel's presentation of evidence of his middle and high-school years was incomplete because counsel failed to present testimony that could have "confirmed" his difficult home life and provided details regarding his school life. Counsel claims such evidence would also have explained why his football injury was so harmful to him. Applicant contends counsel should have called the following witnesses who were available and willing to testify to these matters: (1) Coach Jim Bennett; (2) Coach Floyd Barber; and (3) Carolyn Singley.

Investigation into Middle and High School Years Not Deficient

(168) Counsel's investigation into Applicant's middle and high-school years was not deficient.

(169) As previously noted, the defense team reached out to Carolyn Singley through a relative and provided her with a phone number she could call to contact them. She never called. (WRR2: 113-14; WRR3: 14-15); (State's Writ Ex. 4)(Compton and Jenkins email exchanges dated August 6, 2012, August 10, 2012, and August 13, 2012).

(170) The defense team did contact a few of Applicant's coaches, including Coach Jim Bennett. One of the coaches did not want to be involved. Another coach had health problems and could not attend the trial. The defense successfully cultivated Coach Bennett as a witness, however, and planned on calling him to testify in the punishment phase. (WRR3: 20-21); (State's Writ Ex. 1)(entry dated 08/03/2012 09:52 PM CDT).

(171) The fact that Coach Floyd Barber was not one of the coaches contacted by the defense team does not render counsel's investigation into Applicant's middle and high-school years deficient. After all, the information Coach Barber would have provided was substantially similar to that given to the defense team by Coach Bennett. (Defense Writ Exs. 8 & 9).

Decision Not to Present Coach Bennett's Testimony Was Not Deficient

(172) Although prepared to call Coach Bennett as a punishment witness, in the end, counsel made a strategic decision not to present his testimony. (WRR3: 20-21).

(173) As his billing notes reflect, counsel grappled with the decision:

> Discussed coach bennett testimony and determined it was dangerous and not worth it because he knew both Desaree and Mischelle and will be used by state to make out guy look even worse.
>
> [and]
>
> might call Coach Bennett but risky because he knew Desaree and Mischelle and thought highly of them very likely that state will turn this against us and make him more of a states witness than ours.

(State's Writ Ex. 1)(entry dated 08/16/2012 11:53 PM CDT and 08/26/2012 09:58 PM CDT)(grammatical errors intact).

(174) Ultimately, counsel made a strategic decision not to present Coach Bennett's testimony. This decision fell within reasonable professional norms.

(175) According to his affidavit, Coach Bennett would have testified that Applicant struggled academically, that he had a "home situation that was not good," that his "family bounced around a lot," and that the coaches reached out to help Applicant. He would also have testified that Applicant was a talented football player with a chance to go to college on a scholarship, but he was injured in a game and could not play football anymore, which sent him into a depression. (Applicant's Writ Ex. 9).

(176) Counsel did not need Coach Bennett to establish that Applicant had a difficult home life. As previously noted, this evidence was available through other sources, namely, his brother Greg, his cousin Rhea, Dr. Kessner, and Dr. Proctor's report.

(177) Also, counsel did not need Coach Bennett to establish that Applicant was a talented high school football player who was devastated by his lost chance to play college football when he was seriously injured in a game. This was established through the testimony of Applicant's brother Greg and his friend Jason Shanks. It was also corroborated by Dr. Proctor's report. (RR46: 84-86, 94; RR51: 14-20; State's Ex. 185).

(178) Additional testimony from Coach Bennett on these facts would have yielded little benefit to the defense.

(179) Moreover, as counsel documented in his billing notes, the defense ran the risk that the State would confront Bennett on cross-examination with the details of Applicant's gruesome crime and that Bennett would react poorly, thus, harming Applicant's defense.

(180) This was a reasonable fear given James Kemp's anger at learning for the first time on cross-examination by the State the gruesome nature of Applicant's offense. As counsel documented in his billing notes, "Kemp who was a friend of client he did ok for us and was pissed of after he got off stand because he claimed he did not know severity of offense, luckily state did not pick up on this." (State's Writ Ex. 1)(entry dated 08/28/2012 11:10PM CDT)(grammatical errors intact).

Defense Not Prejudiced by Any Deficiency in Investigation and Presentation of Evidence Related to Applicant's Middle and High School Years

(181) Regardless of any alleged deficiency, Applicant suffered no prejudice from counsel's decision not to present the complained-of witnesses testimony regarding his middle and high-school life.

(182) As set out above, the complained-of evidence was presented through other sources. Thus, the decision not to call any of these witnesses did not preclude counsel from presenting the information and relying on it in their punishment defense.

(183) Moreover, the fear that some harm might come from cross-examination of Coach Bennett by the State was real. Arguably, testimony from Carolyn Singley and Coach Barber posed the same risk that they would react poorly when confronted with the details of the crime.

(184) Also, as previously noted, given Ms. Singley's failure to ever call the defense team in response to their efforts to speak with her, it is likely that she would, in fact, have been reluctant to help Applicant's defense and made a less than persuasive witness.

Applicant's Life Leading Up to the Capital Murder

(185) Applicant contends counsel's presentation of evidence about his life leading up to the capital murder was incomplete. He argues counsel should have cross examined Justus Rogers about Applicant's relationship with Desaree and should have called Karl Rogers and Dr. Shane Marcum to testify about Applicant's physical stressors. (Application, pp. 56-57).

Counsel Not Deficient for Not Cross-Examining Justus Rogers or Presenting Evidence about Physical Stressors Through Karl Rogers and Dr. Marcum

(1) Justus Rogers

(186) Counsel's decision not to cross-examine Justus Rogers fell within reasonable professional norms.

(187) Justus Rogers, Applicant's second cousin and Desaree's friend, testified for the State in the punishment phase of Applicant's trial. He had known

Mischell and Desaree for ten years. Among other matters, Justus testified about Desaree's plans to join the armed forces after graduating from high school. He also testified that Applicant and Desaree did not seem very close; the two argued frequently and Desaree always complained to him about Applicant. (RR49: 221-25).

(188) As Applicant asserts, defense counsel did not cross examine Justus Rogers at trial. (RR49: 227).

(189) Cross-examination of Justus would have yielded little, if any, benefit to Applicant's defense.

(190) Applicant contends that, if cross-examined, Justus would have testified that Applicant seemed to be trying to develop a positive relationship with Desaree, but that Desaree did not like Applicant and did not listen to him because he was not her father. Justus would have described it as an awkward situation. (Applicant's Writ Ex. 12).

(191) Applicant argues that Justus's observations about Applicant's attempts to develop his relationship with Desaree would have "removed the sting from some of Justus's direct testimony" about Desaree's dislike of and complaints about Applicant. (Application, p. 56).

(192) Testimony from Justus that Applicant attempted to work on his relationship with Desaree would have had little mitigating value. These attempts could have been motivated by Applicant's desire to maintain his relationship with Mischell and all of its benefits, rather than a sincere desire to gain Desaree's affection.

(193) Moreover, the testimony would have been a double-edged sword in that Desaree's rebuffs of Applicant's attempts to win her over suggest Applicant may have had cause to resent Desaree.

(2) Karl Rogers and Dr. Marcum

(194) Counsel's decision not to present testimony from Karl Rogers and Dr. Marcum was not deficient either.

(195) As previously noted, the defense team did make contact with Karl Rogers, but found him intoxicated on his mother's porch. The defense team made a reasonable choice not to cultivate him further because he would have been a witness of questionable reliability and availability. (WRR2: 146-47).

(196) As for Dr. Marcum, counsel was unaware of his potential as a witness.

(197) The defense team made diligent efforts to locate potential witnesses and, in that regard, solicited leads from Applicant himself. Even though Applicant spoke to Dr. Marcum on the phone from the jail and purportedly obtained beneficial information from him, Applicant told no one on the defense team about him. (WRR3: 15-16). Thus, the blame for failing to contact and cultivate Dr. Marcum as a witness lies with Applicant himself, not his defense team.

(198) In any event, counsel did not need Karl Rogers or Dr. Marcum's testimony to establish Applicant's physical stressors.

(199) Applicant contends Karl would have testified that Applicant injured his back while driving a forklift at work. He would also have testified that the injury was hard on Applicant because of the physical pain it caused and because Applicant could no longer work and provide for his family. (Applicant's Writ Ex. 13).

(200) Applicant contends his chiropractor, Dr. Shane Marcum, would have testified that (1) Applicant came to him for treatment following his back injury at work; (2) the injury prevented Applicant from sitting, standing, or sleeping for long periods of time; (3) this was a source of stress in Applicant's life; (4) Applicant was an ideal patient – quiet, respectful, and pleasant, and followed instructions, and (5) if Applicant was depressed at the time of his treatment, it could have worsened his condition and hindered his recovery. (Applicant's Writ Ex. 11).

(201) Counsel did not need the foregoing testimony from Karl Rogers and Dr. Marcum because evidence of Applicant's back injury and chronic pain was already available.

(202) In particular, Greg Scott testified during guilt that Applicant currently had back pain from his football injury. (RR46: 94). Greg stated Applicant volunteered for experimental drugs because of his back pain. (RR46: 94).

(203) Dr. Kessner testified that she had reviewed the report of Dr. Proctor, who had interviewed Applicant. (RR48: 44). The report, which was admitted into evidence, showed that the stressors in Applicant's life included his back injury and chronic pain. (RR48: 45; State's Ex. 185).

(204) Moreover, Dr. Proctor testified that Applicant suffered from depression following his work injury. (RR48: 127-28). Dr. Proctor believed Applicant was honest about his mental symptoms during their interview. (RR48: 173).

(205) Based on the preceding evidence, counsel argued in closing during the guilt/innocence phase about the stressors that had been building up in Applicant's life around the time of the capital murder. And counsel was able to argue that Applicant's chronic back pain was one of the many stressors that led to his abandonment rage. (RR48: 204, 208).

(206) Additional evidence about the back injury and chronic pain Applicant suffered was subsequently presented during the punishment phase of trial through Applicant's friend and former co-worker – James Kemp.

(207) James Kemp testified that he and Applicant worked together for over two years at Jerry Co., doing "machine shop type work," and that Applicant suffered from back problems with his next job. (RR50: 58, 63).

(208) Testimony from Karl Rogers or Dr. Marcum would, at best, have been duplicative or cumulative of the preceding evidence. Counsel was not deficient for choosing not to present more of the same.

Defense Not Prejudiced by Counsel's Decision Not to Present Testimony from Justus Rogers, Karl Rogers, and Dr. Marcum

(209) Regardless, Applicant's defense suffered no prejudice from counsel's decision not to cross-examine Justus or to present evidence of stressors through Karl Rogers and Dr. Marcum.

(210) As set out above, given his drug use, Karl Rogers was unlikely to have been available even if cultivated by counsel to testify. Moreover, his reliability would have been questionable at best.

(211) But even assuming counsel could have presented credible testimony from all three complained-of witnesses, it would have had no bearing on his mitigation defense.

(212) As previously noted, substantial evidence of the same nature was available to counsel without the testimony of these witnesses. Their testimony would have been cumulative.

In Conclusion

(213) Even assuming that counsel could and should have presented testimony from his daughter, Tyra, and testimony from the complained-of witnesses about his early life, middle and high-school life, and life leading up to the offense, the omission did not prejudice Applicant's defense.

(214) As set out above, most of the testimony Applicant now proffers was available to his defense through other sources.

(215) Moreover, the State's evidence supporting the death sentence was overwhelming.

(216) The facts and circumstances of the crime, which were undisputed, clearly demonstrated that Applicant was a man capable of extreme and gruesome violence, and that the instant offense was simply the last in a line of increasingly violent behavior. Anyone representing Applicant would have had a difficult job defending his life given these facts.

(217) Contrary to Applicant's assertion, the jury was presented with mitigating evidence about his difficult and violent childhood, the painful derailment of his dreams of a football career and college education, and his family history of severe mental illness. This was simply insufficient to persuade the jury to spare Applicant's life. Additional evidence of the same nature would not have altered the jury's answers to the special issues.

(218) Counsel rendered effective assistance in the investigation and presentation of mitigating evidence.

(219) Ground 2 should be denied.

GROUND 3: Counsel's Alleged Failure to Present a Social Historian During Punishment

Applicant contends counsel rendered ineffective assistance by not presenting the testimony of a social historian in the punishment phase. Applicant argues that a social historian could have explained how Applicant's social history molded the person he became. In particular, Applicant asserts that counsel should have presented the testimony of Dr. Scott Bowman or someone with similar qualifications, such as Laura Sovine,[6] to educate the jury about Applicant's social history. (Application, pp. 59-76).

(220) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in trial counsel's decision not to present the testimony of a social historian.

(221) Even assuming counsel's decision was deficient, Applicant fails to demonstrate by a preponderance of the evidence any resulting prejudice.

Counsel Not Deficient for Choosing Not to Present a Social Historian

(222) Applicant's contention is premised on recommendations provided in the American Bar Association's (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

(223) The objective of the guidelines is to "set forth a national standard of practice for the defense of capital cases." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 1.1(A) (2003).

(224) In that regard, the guidelines provide that the defense mitigation presentation in the punishment phase should either help explain the crime or show the combination of factors that led the defendant to commit the crime. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.11, Commentary (2003). To understand what caused or led a defendant to commit capital

[6] Applicant offered Dr. Bowman's affidavit in conjunction with the habeas application. He did not specifically proffer Ms. Sovine's expert opinion as an alternative until the writ hearing on the application.

murder often requires evidence that explains the defendant's "complete social history from before conception to the present." *Id.*

(225) The guidelines do not require that a defendant's social history be presented through expert testimony. They provide that "[e]xpert witnesses may be useful for this purpose and may assist the jury in understanding the significance of the observations." *Id.* Moreover, if counsel chooses to utilize experts, the guidelines recommend that counsel "choose experts who are tailored specifically to the needs of the case, rather than relying on an "all-purpose" expert. *Id.* 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.*

(226) Consistent with the guidelines, Applicant's counsel developed and presented mitigating evidence to show what led Applicant to murder Mischell and Desaree.

(227) Counsel theorized that life without parole was an adequate punishment for Applicant's crime because, even if Applicant was not insane at the time of the offense, the crime was precipitated by psychological issues, not revenge, and those issues could be managed in the controlled prison environment. (WRR2: 264-65; WRR3: 131-32).

(228) Counsel laid the foundation of this "case for life" during the guilt/innocence phase. Through lay and expert witness testimony, counsel introduced evidence that Applicant's crime was the culmination of a violent and deprived childhood, the loss of opportunity and adult support in high school, and the stress of physical injury, loss of income, and rejection by Mischell.

(229) Counsel built upon this foundation during the punishment phase with additional lay and expert witness testimony. The defense presented additional testimony regarding the psycho-social triggers of the offense through James Kemp, Jason Hanks, and Rhea Scott. Counsel also presented evidence through S.O. Woods, Travis Turner, Johnny Lindsey, and Austin Jackson about prison's ability to control Applicant's behavior.

(230) Counsel elected not to use a social historian such as Dr. Bowman or Laura Sovine in furtherance of this punishment case. This strategic decision fell within reasonable professional norms.

(231) As noted above, the ABA guidelines do not mandate the use of a social historian. They provide that the defendant's social history be presented through the testimony of experts, if useful, and lay witnesses. *Id.*

(232) Furthermore, utilizing a social historian had a down side. As counsel explained:

> A social historian would take in all aspects, including an interview with our client, which would be very detrimental. There were interviews with family members. There would be conflicting interviews, all of which would potentially be turned over to the State. There was information out there that this social historian we'd come across, for sure, because he's gonna be interviewing everybody, including the client, that the State didn't know about. And that would then be included and turned over. So we had to be somewhat careful about experts, including any social historian, if we got one involved, to look at things. We felt it was best to present these through our lay witnesses and perhaps some experts through the – the mental health issues as opposed to a social historian because of the negatives that would be associated with our client.

(WRR2: 267). *See also* (WRR2: 143-45).

(233) Counsel's concern about the disclosure of additional aggravating evidence was legitimate. As counsel noted, a social historian's job is to get a complete picture of the defendant, including the bad, and there was aggravating information about Applicant that could have been revealed, e.g., that Applicant had been a drug dealer; that he had intentionally dropped a bowling ball on a cat's head; that he left the scene after the murders and returned four hours later, watched porn, and had sex with Mischell's corpse. (WRR2: 140-43, 267-68).

(234) By opting not to present a social historian, counsel necessarily prevented the disclosure of additional aggravating information that could be used against him by the State. This strategy is consistent with the guidelines. In particular, the guidelines demand that counsel "anticipate the evidence that may be admitted in response and to tailor the presentation to avoid opening the door to damaging rebuttal evidence that would otherwise be inadmissible." *Id.*

(235) In addition to the risks it posed, the testimony of Dr. Bowman and Ms. Sovine, the two historians Applicant claims counsel should have used, would have afforded little benefit to the punishment defense.

(236) Neither Dr. Bowman's nor Ms. Sovine's testimony was particularly compelling or beneficial to Applicant's punishment defense.

(237) Dr. Bowman, a criminal justice professor, would have testified that Applicant committed this capital murder because of his lack of self-control. Bowman believes this lack of self-control is due to Applicant's unstable and negligent upbringing and a high school environment "that was more concerned about the athlete than the young man." Bowman opines that, with a better upbringing, Applicant's "decision-making ability and self-control would have been dramatically different . . . ." (Applicant's Writ Ex. 1).

(238) Dr. Bowman based the preceding opinion on a study called "A General Theory of Crime," by Gottfredson and Hirschi and other studies that have "demonstrated statistically significant outcomes for the correlation between low self-control and crime/delinquency." (Applicant's Writ Ex. 1).

(239) According to Dr. Bowman, Gottfredson and Hirschi present four general principles on "the characteristics of ordinary crimes":

> •Ordinary crimes normally involve simple and immediate gratification with little or no long-term benefits, are carried out with a level of excitement and risk but with little skill and planning, and generally produce few benefits for the offender while causing significant pain and suffering for the victim.

> •Individuals who commit crimes and delinquent acts are usually impulsive, insensitive, physically generated as opposed to mentally generated, risky, short-sighted, and nonverbal.
>
> •The foregoing traits comprise a "'stable construct' that can not only be perceived during the earliest stages of development, but is also demonstrated throughout one's life."
>
> •Ineffective, inconsistent, and/or absent child rearing is the most important contributor to self-control: while consistent monitoring of a child's lack of self-control and appropriate punishment reinforces a measure of self-control, the opposite will produce a juvenile and adult with no self-control.

(Applicant's Writ Ex. 1).

(240) Bowman's opinion about the correlation between the lack of self-control and criminal activity is a matter of common knowledge and, consequently, not very compelling as "expert" testimony.

(241) In any event, Dr. Bowman's correlation of Applicant's life to "A General Theory of Crime" is inconsistent with other evidence.

(242) Dr. Bowman opines that the following three aspects of "A General Theory of Crime" are particularly relevant to Applicant's upbringing and socialization:

> •The process of self-control development is completed somewhere between the ages of eight and ten. Because of the heavy correlation between child rearing and self-control/crime, early development is paramount to future self-control.
>
> •While family is the foundation of instituting self-control in a child (and thus, as an adult), schools and other social institutions can contribute to the process of socialization and increased/decreased self-control.

> •A demonstrated lack of self-control in a child would lead to criminal and delinquent behaviors, and also explain other problem behaviors such as cutting class, smoking, and drinking.

(Applicant's Writ Ex. 1).

(243) The evidence contradicts Dr. Bowman's characterization of Applicant's criminal behavior as lacking in planning, however. Rather, it shows a man capable of patience and forethought.

(244) For instance, several hours before murdering Mischell and Desaree, Applicant planted a recording device under the bed in an effort to capture Mischell in the act of "cheating" on him. Then Applicant lay in bed, waiting, before confronting Mischell at knifepoint.

(245) Likewise, before sexually assaulting Charity, Applicant spoke with her on several occasions while doing laundry, exchanged numbers with her, went out for drinks with her and her boss, gave her a ride home, invited himself into her apartment, and visited for a while. He did not attack her until she attempted to leave to visit a friend. (RR49: 37-45).

(246) Applicant's long-term harassment of Bobbi Jo Klute also demonstrates his ability to plot and plan. In particular, for months after their dating relationship ended, he followed her around, entered her apartment when she was not there, and would call her from the pay phone near her home. (RR49: 90-92)

(247) Finally, after being pistol-whipped by Edward Watts, Applicant went to his cousin Ashton Scott for help and convinced him to accompany him in confronting Watts at gunpoint. (RR49: 127-28)

(248) Also, the evidence contradicts Dr. Bowman's characterization of Applicant as a child lacking self-control.

(249) For instance, those who knew Applicant during his high school years (Coach Barber, Coach Bennett, and Ms. Singley) do not portray him as lacking self-control. To the contrary, these individuals portray Applicant as a teen with self-control who rarely got into trouble. (Applicant's Writ Exs. 8, 9, 17).

(250) Even assuming the evidence supported Dr. Bowman's characterization of Applicant, portraying Applicant as an individual without self-control would have supported an affirmative finding on the issue of future dangerousness and, thus, would have harmed Applicant's defense, not helped it.

(251) Ms. Sovine, a licensed social worker, performed a biopsychosocial assessment of Applicant. She defined such an assessment as follows:

> It's essentially looking at the client from a fairly broad perspective. So the "bio" means looking at, like, physical issues or medical issues or any kind of – any kind of medical records or medical or physical traits or factors that would affect the client. And the "psycho" piece is usually what makes up their internal kind of structure, personality and mental health. And then the "social" piece would be more what their environment looks like and how they're interacting with others.

(WRR5: 119-20).

(252) Based on her biopsychosocial assessment of Applicant, Ms. Sovine concluded that

> Tyrone was born into a two-parent family where both parents were extremely violent and was continued to be raised in an environment of severe depravation [sic] and neglect and abuse. And, therefore, was not able to successfully master the developmental stages needed to become a functional adult.

(WRR5: 126).

(253) This assessment was based on Ms. Sovine's interview of Applicant and her review of affidavits from family and friends, background records (Applicant's Writ Exs. 35-39), and data from the Center for Disease Control (Applicant's Writ Ex. 47). (WRR5: 127-31). In addition, Ms. Sovine consulted with Dr. Seth Silverman, a psychiatrist hired by Applicant's writ counsel to assist with his habeas defense. (WRR4: 6-8; WRR5: 132).

(254) Ms. Sovine would have been available to testify for Applicant at trial but she would not have made an impressive expert witness. She is inexperienced, having never before testified as a social historian. Moreover, she is unfamiliar with and does not understand how the punishment special issues work. Also, she acknowledged that she is unaware of any death-penalty case where a social historian testified and the death penalty was not assessed. (WRR5: 194-95)

(255) Additionally, Ms. Sovine's assessment of Applicant's life history was limited to his life between birth and eighteen years of age. She did not consider his life in the years after high school up to the time of the offense. (WRR5: 170-71). Thus, Ms. Sovine opines that Applicant is not a functioning adult without ever evaluating his adult life to determine the accuracy of her assessment.

(256) She found no evidence of physical or sexual abuse of Applicant in any of the records she reviewed. (WRR5: 184-85).

(257) She acknowledged that Applicant and his brother Jerry both experienced a similar upbringing and had gone to prison, but unlike Applicant, Jerry did not have a history of committing violent acts. (WRR5: 192)

(258) She also acknowledged that a social historian could discover information during a biopsychosocial assessment that harmed a defendant's punishment defense, that the historian would have to acknowledge the good along with the bad, and, that consequently, the bad would be turned over to State. (WRR5: 189-91, 202-04)

(259) In that regard, she would have had to acknowledge at trial that a social study performed on Applicant during juvenile delinquency proceedings resulted in a positive assessment of his mother's parenting and a recommendation that Applicant be returned to her care. (WRR5: 179-80).

(260) She would also have had to acknowledge Applicant's prior drug dealing. (WRR5: 181).

(261) And lastly, she would have had to acknowledge that Al Merchant, a sex-offender treatment provider and social worker who treated Applicant after his conviction for the sexual assault of Charity Trice, rightly predicted that Applicant would reoffend. (WRR5: 182).

(262) In short, although Ms. Sovine's assessment did offer some explanation for how Applicant came to be the person who committed the instant offense, its mitigating value was questionable and it posed the risk of further harm to Applicant's defense.

(263) Counsel was not deficient for choosing not to present a social historian such as Dr. Bowman or Ms. Sovine.

Defense Not Prejudiced by Decision Not to Present Social Historian

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

(265) As set out above, the testimony that Dr. Bowman or Ms. Sovine would have proffered was not compelling mitigating evidence. And, their testimony would have risked the disclosure of additional aggravating evidence that would have been detrimental to Applicant's punishment defense.

(266) Moreover, the State's evidence of Applicant's violent past and the facts and circumstances of the capital murder constituted strong and persuasive evidence of Applicant's future dangerousness.

(267) Thus, it is improbable that a social historian's testimony would have altered the punishment verdict.

(268) Applicant's defense was not prejudiced by counsel's decision not to present a social historian.

(269) Counsel rendered effective assistance of counsel.

(270) Ground 3 should be denied.

GROUND 4: Exclusion of Testimony of Dr. Sorensen and Dr. Vigen

In ground 4 of his habeas application, Applicant contends the Court abused its discretion by excluding at punishment the testimony of defense experts Mark Vigen, Ph.D. and Jon Sorensen, Ph.D. (RR50: 112-234). The Court ruled their testimony inadmissible under evidence rule 702. (RR50: 235-237). Applicant contends Vigen's and Sorensen's testimony was directly relevant to the jury's determination of the future-dangerousness special issue, that it was admissible

under rule 702, and that its exclusion violated his due process right to a fundamentally fair trial.

Applicant's Complaint is Procedurally Barred

(271) Habeas corpus may not be used to relitigate matters that were addressed on appeal. *See Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994). Applicant's complaints about the exclusion of Dr. Sorensen's and Dr. Vigen's testimony were raised and rejected on direct appeal. *See Cade*, No. AP-76,883, 2015 Tex. Crim. App. Unpub. LEXIS 156 at *37-48. Consequently, ground 4 is procedurally barred on habeas review. *See, e.g., Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984) (holding it need not address, on habeas, matters that were addressed on direct appeal).

(272) Also, habeas review is reserved for judicial defects in the trial court that render the judgment void, or for denials of fundamental or constitutional rights. *Ex parte Sanchez*, 918 S.W.2d 526, 527 (Tex. Crim. App. 1996). Applicant makes a thinly-veiled attempt to transform his attack on the exclusion of Dr. Vigen's and Dr. Sorensen's testimony into a claim of constitutional dimension. His challenge is, in actuality, nothing more than a claim of evidentiary error. Consequently, ground 4 is not cognizable on habeas review.

(273) Even assuming no procedural bar, however, Applicant fails to establish entitlement to relief on this ground.

Court Did Not Exclude Dr. Vigen's Opinion Regarding TDCJ's Ability to Control Inmates in General

(274) Applicant claims the trial court erroneously excluded psychologist Mark Vigen's testimony on two issues: (1) prison's ability to control inmates in general and (2) prison's ability to control Applicant. (Application, p. 79).

(275) The record shows no ruling on the admissibility of Dr. Vigen's testimony regarding prison's ability to control inmates in general. The Court only ruled on the admissibility of Dr. Vigen's testimony about Applicant. At the 702 hearing, Dr. Vigen initially testified that he planned to testify only about the prison system's ability to control inmates in general; he had no intention of offering an opinion about Applicant. (RR50: 218, 222, 228-

229, 233). Towards the end of the hearing, however, Dr. Vigen had changed his mind and stated that he could also testify about prison's ability to control Applicant. (RR50: 233-235). At this point, the State objected to the reliability of Dr. Vigen's proffered opinion regarding Applicant in particular. (RR50: 235). After hearing arguments from both sides, the Court sustained the State's objection and ruled that Dr. Vigen's testimony regarding the TDCJ's ability to control Applicant particularly was inadmissible. (RR50: 235).

(276) The State never objected to Dr. Vigen's testimony about prison's ability to control inmates in general, and the Court did not exclude it. It was simply not offered by the defense.

(277) Thus, to the extent Applicant's complaint is premised on Dr. Vigen's testimony about prison's ability to control inmates in general, it is affirmatively refuted by the trial record and should be denied.

Testimony of Dr. Sorensen and Dr. Vigen Properly Excluded

(278) Applicant fails to prove by a preponderance of the evidence that the exclusion of (1) Dr. Sorensen's testimony about inmates who committed intimate-partner homicide and (2) Dr. Vigen's testimony as to prison's ability to control Applicant, in particular, violated due process.

(279) While the Constitution guarantees Applicant the right to present relevant evidence, that right is not absolute. *See United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Lewis v. State*, 815 S.W.2d 560, 568 (Tex. Crim. App. 1991)). It is subject to reasonable restrictions that accommodate other legitimate interests in the criminal trial process. *Scheffer*, 523 U.S. at 418. "As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or "disproportionate to the purposes they are designed to serve." Id. at 418-19.

(280) Notwithstanding its relevance to Applicant's punishment defense, the testimony of Drs. Vigen and Sorensen was inadmissible under evidence rule 702. Tex. R. Evid. 702.

(281) As set out below, the Court acted within its discretion in excluding the testimony under rule 702. It did not arbitrarily or unjustly apply the rule to exclude the testimony, and its application did not preclude Applicant from putting forth a defense. Thus, Applicant's constitutional right to due process was not violated.

Testimony Properly Excluded Under Rule 702

(282) Rule 702 permits the admission of scientific, technical, or other specialized knowledge if it will assist the trier of fact to understand the evidence or to determine a fact in issue. Such knowledge may be offered through an expert witness in the form of an opinion or otherwise. *See* Tex. R. Evid. 702.

(283) In order for expert testimony to be admissible, however, the proponent of the testimony must demonstrate, by clear and convincing evidence, that such testimony is both relevant and reliable. *See Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011) (citing *Kelly v State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992)).

(284) Where the expertise concerns a "soft science" such as the social sciences, the following factors are to be considered in determining the reliability of the opinion: (1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert's testimony is within the scope of that field; and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. *See Tillman*, 354 S.W.3d at 435-36 (first citing *Weatherred v. State*, 15 S.W.3d 540 (Tex. Crim. App. 2000); then citing *Nenno v. State*, 970 S.W.3d 549 (Tex. Crim. App. 1998)). The test for soft sciences is commonly referred to as the *Nenno* test. *See, e.g., Coble v. State*, 330 S.W.3d 253, 274 (Tex. Crim. App. 2010) (explaining the reliability test for "soft" sciences as set out in *Nenno*, 970 S.W.2d at 561).

(285) When reviewing an opinion that is based on a "hard" science, courts typically apply the reliability factors set out in *Kelly*. *See id.* at 273 (explaining the reliability test for "hard" sciences as set out in *Kelly*, 824 S.W.2d at 572).

(286) To be considered reliable under *Kelly*, the expert opinion must satisfy three criteria: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. *See Medrano v. State*, 127 S.W.3d 781, 784 (Tex. Crim. App. 2004).

(287) The following factors may also be considered in determining reliability: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community; (2) the expert's qualifications; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error for the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person who applied the technique on the occasion in question. *See Jessop v. State*, 368 S.W.3d 653, 670-71 (Tex. App.—Austin 2012, no pet.) (citing *Kelly*, 824 S.W.2d at 573).

(288) The reliability inquiry is a flexible one and may vary from case to case. *See Vela v. State*, 209 S.W.3d 128, 134 (Tex. Crim. App. 2006). The reliability test for "hard sciences" may even be appropriate in some "soft science" cases. *See Medrano*, 127 S.W.3d at 785.

(289) A trial court's decision to admit or exclude expert testimony is reviewed under an abuse-of-discretion standard. *See Tillman*, 354 S.W.3d at 442. The reviewing court must uphold the trial court's decision as long as it is reasonably supported by the record and is correct on any applicable theory of law. *See Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005).

(290) As a preliminary matter on these issues, it should be noted that Applicant has attached the affidavits of Dr. Sorensen and Dr. Vigen in support of his habeas complaint. (Applicant's Ex. 5, 6). For the most part, the affidavits are redundant of the testimony presented at the 702 hearing. In any event, neither affidavit should be considered on habeas since the reviewing court must review the trial court's ruling in light of what was before the trial court *at the time the ruling was made. See Weatherred*, 15 S.W.3d at 542.

Dr. Sorensen's Opinion Based on Study that was Novel, Unpublished, Untested, and Not Peer Reviewed

(291) Dr. Sorensen, who has a Ph.D. in criminal justice, testified that inmates involved in intimate-partner homicides are less likely than other inmates to commit acts of violence in prison. (RR50: 113). In reaching his conclusion, Dr. Sorensen compared two pools of inmates: (1) inmates serving time for intimate-partner homicides and (2) inmates serving time for various other types of offenses.

(292) In gathering the pool of intimate-partner homicide inmates for his study, Dr. Sorensen and his team first obtained a list of about 15,820[7] homicide inmates in the TDCJ. (RR50: 116, 183-184, 192). From this pool, Dr. Sorensen's team identified 600 inmates whose victims were intimate partners. (RR50: 116-117, 183). From this 600, the team gathered a random sample of 189 inmates.[8] (RR50: 117, 183). Dr. Sorensen and his team reviewed the disciplinary records of each of the 189 inmates. (RR50: 185, 201-202).

(293) For the comparison pool, Dr. Sorensen's team began with a list of approximately 103,000 inmates that it had previously gathered for another study. (RR50: 187, 190-191). From this 103,000, the team eliminated the female inmates and was left with approximately 97,000 inmates. (RR50: 187). Dr. Sorensen and his team then reviewed the disciplinary files of the 97,000 inmates for the year 2008 only. (RR50: 189-190). Dr. Sorensen did not check to see if 2008 was an anomalous year in terms of assaults. (RR50: 200).

(294) Dr. Sorensen reached his conclusion about intimate-partner homicide inmates by comparing the two pools using the Z-test, a test that helps determine whether an observed difference was likely due to chance. (RR50: 189). Dr. Sorensen testified that the Z-test confirmed the statistical competence of his findings in this study. (RR50: 189, 209).

---

[7] Dr. Sorensen later referred to this pool of homicide offenders as 13,969. (RR50: 191).

[8] Out of the 189 inmates, 24 had committed homicides that included the killing of both an intimate partner and a non-intimate victim. (RR50: 184, 206-207, 212). Out of this 24, there were 11 cases in which the non-intimate victim was a child. (RR50: 213).

(295) Dr. Sorensen's testimony at the 702 hearing revealed problems with the reliability of his study. Dr. Sorensen testified that the study was not complete, had never been peer reviewed, had never been tested, and was not published. (RR50: 193, 195). Dr. Sorensen believed the study was complete enough to be reviewable, but he still wanted to run a logistic regression model to determine how the offense details and the offender's personal characteristics and background would contribute to an inmate's conduct in prison. (RR50: 194-195, 207-208). Dr. Sorensen expressed confidence that the study, once complete, would pass peer review and be published. (RR50: 196).

(296) Despite the incomplete nature of the study, Dr. Sorensen stated that the methodology he used in this study was generally accepted and that he had done twenty or thirty of these types of studies. (RR50: 207, 209). Moreover, some of his past research, which he had used in this study, had purportedly been cited in opinions of the Court of Criminal Appeals. (RR50: 210). Dr. Sorensen also explained that peer review does not necessarily validate a study; a study could only be validated through replication. (RR50: 203-204). His study, however, was a first of its kind and had never been tested. (RR50: 204).

(297) One of the methodologies in the study raised further cause for concern. For the comparison pool of 97,000 inmates, Dr. Sorensen reviewed the inmates' disciplinary records for only 2008. (RR50: 190-191, 201). Yet for the 189 inmates in the intimate-partner-homicide pool, Dr. Sorensen reviewed the disciplinary files for the inmates' entire length of confinement. (RR50: 190-191, 201-202).

(298) Under these circumstances, the trial court acted well within its discretion when it ruled that Dr. Sorensen's testimony was inadmissible under rule 702.

Dr. Vigen Lacked Sufficient Knowledge Regarding Applicant to Offer an Opinion About Him

(299) Dr. Vigen's testimony at the 702 hearing pertained almost solely to prison's ability to control inmates in general. Dr. Vigen testified that capital-murder inmates did not have a higher rate of rule infractions and violence than other inmates, and that capital-murder inmates are no more

likely to commit violent offenses than other inmates. (RR50: 223-226). Dr. Vigen explained that the prison system controls inmates by using a classification system, by placing inmates in high-security prisons, and by using well-trained correctional officers to monitor behavior. (RR50: 231). Without elaborating on the details, Dr. Vigen simply pointed to the testimony of two prison experts – S.O. Woods and Travis Turner – on the matter: "All the things that the others, the two other institutional people said, that's how they're going to do it." (RR50: 231).

(300) Dr. Vigen claimed his opinion about prison's ability to control capital-murder inmates was based on the following factors: (1) his thirty-five years of working as a psychologist in Texas prisons; (2) his review of a number of articles on prison violence; (3) a 2002 article that he co-authored, summarizing research "indicating that a majority of death row inmates do not exhibit violence in prison even in more open institutional settings"; and (4) his observation of the testimony of S.O. Woods and Travis Turner in this case. (RR50: 219-223, 229-230).

(301) With respect to Applicant, however, Dr. Vigen had only reviewed some of his TDCJ records and offense records from Collin County. (RR50: 222, 234). Dr. Vigen had not personally evaluated Applicant. (RR50: 222, 234). Dr. Vigen knew nothing about the gruesome facts of the capital-murder and nothing else about Applicant.

(302) It was, therefore, within the Court's discretion to conclude that Dr. Vigen lacked sufficient knowledge about Applicant to render an opinion about him. *See generally* Tex. R. Evid. 705(c) ("If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible."). The record shows no abuse of discretion in the Court's decision to exclude Dr. Vigen's opinion about Applicant.

Not Precluded From Presenting Defense

(303) Exclusion of Dr. Vigen's and Dr. Sorensen's testimony did not preclude Applicant from presenting a defense at punishment because evidence of a similar nature was presented through other witnesses.

(304) In particular, as set out in greater detail in the findings related to harmless error below, extensive evidence of how the prison system manages inmates was admitted through prison officials (Travis Turner and S.O. Woods) and a former inmate (Johnny Lindsey).

(305) In light of the foregoing, the exclusion of Dr. Sorensen's and Dr. Vigen's testimony did not violate Applicant's constitutional right to due process.

Any Violation Harmless

(306) Even if there were a constitutional violation, relief is not warranted because Applicant suffered no harm.

(307) On habeas review, Applicant bears the burden of proving he was harmed by any constitutional violation. Specifically, he must show by a preponderance of the evidence that the error actually contributed to his conviction or punishment. *Ex parte Fierro*, 934 S.W.2d 370, 374-75 (Tex. Crim. App. 1996).

(308) Applicant fails to demonstrate harm.

(309) The testimony of Dr. Vigen and Dr. Sorensen provided little benefit to Applicant's defense.

(310) First, Dr. Sorensen's opinion did not pertain personally to Applicant but to inmates in general who were serving time for intimate-partner homicides. Moreover, Applicant did not just kill his intimate partner, but also sexually assaulted his partner and killed his partner's daughter. Only 24 inmates in Dr. Sorensen's pool of intimate-partner homicide inmates killed both an intimate partner and a non-intimate victim. (RR50: 184, 206-207, 212). Thus, assuming Dr. Sorensen's opinion was reliable, it was only marginally relevant to this case.

(311) Second, Dr. Vigen explained that, by "high probability," he meant more than 50 percent. (RR50: 218). His opinion that there was a "high probability" that prison could control Applicant was, therefore, not very compelling.

(312) Moreover, there was other testimony from which the jury could draw the same conclusion offered by Dr. Vigen's opinion testimony.

(313) The evidence showed the general inmate population in prison is classified from G-1 to G-5, with G-1 being the least restrictive and G-5 being the most restrictive. (RR49: 238, 244; RR50: 140). If Applicant were sentenced to life without parole, he would automatically be classified as G-3. (RR49: 244-245). Applicant could later be classified as G-4 or G-5, but an inmate serving a sentence of life without parole can never be classified as anything lower than a G-3. (RR49: 243-244; RR50: 141).

(314) S.O. Woods testified that the G3 category was created to ensure that prisoners serving long sentences were housed in a manner that would not give them opportunities for escape. (RR50: 143). Mr. Woods explained that G-3 inmates serving life without parole are treated differently from other G-3 inmates. For instance, while the rules permit the assignment of G-3 inmates to dorms rather than cell blocks, it was unlikely that a G-3 inmate serving life without parole would ever be assigned to a dorm. (RR50: 142-143). Mr. Woods opined that, given the nature of Applicant's offense, Applicant would be assigned to a cell block if sentenced to life without parole. (RR50: 180).

(315) The jury also heard testimony about prison life from Johnny Lindsey, an exoneree who had served twenty-six years of a life sentence for a wrongful aggravated-rape conviction. (RR50: 79-80). Mr. Lindsey was housed in a cell block for the entire length of his confinement; he was never in a dorm. (RR50: 83). Mr. Lindsey testified in detail about the numerous restrictions and rules he lived under while confined in a maximum security unit. (RR50: 82-98). He claimed that guards controlled every aspect of inmates' lives. (RR50: 97-98).

(316) With respect to Applicant's prison history, Mr. Woods testified that he had visited a facility where Applicant was briefly confined and talked to administrators in other facilities where Applicant had served some time. (RR50: 149). He also reviewed Applicant's prison records and found nothing remarkable. (RR50: 150). Though he saw something in the prison records about Applicant getting into a fight, he found no disciplinary proceedings stemming from the incident. (RR50: 151). Mr. Woods surmised that authorities could not find a basis for a formal charge and that it was simply a fight where both men were at fault. (RR50: 151).

(317) In short, Dr. Vigen's opinion regarding prison's ability to control Applicant would have added nothing significant to the punishment phase of trial.

(318) And importantly, as set out in the factual summary of these findings and conclusions, the evidence of Applicant's future dangerousness was substantial and compelling.

(319) Thus, admission of the testimony of Drs. Sorensen and Vigen would not have made a difference in the jury's punishment verdict.

(320) Ground 4 should be denied.

GROUND 5: Counsel's Decision Not to Present Dr. McGarrahan's Testimony in Punishment Phase

In ground 5, Applicant contends trial counsel rendered ineffective assistance by choosing not to present Dr. Antoinette McGarrahan's testimony in the punishment phase. (Application, pp. 82-85).

(321) Applicant fails to prove by a preponderance of the evidence that counsel's decision not to present Dr. McGarrahan's testimony 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*).

(322) Dr. McGarrahan is a forensic psychologist. She was hired by the defense to conduct a neuropsychological evaluation of Applicant. Based on her evaluation, she opined that Applicant suffered from depression, reported symptoms of post-traumatic stress disorder (PTSD), and scored in the borderline to low-average range of intellectual functioning. She also opined that he appeared remorseful. (RR47: 11, 30, 89, 92-96, 97).

(323) Counsel attempted to offer Dr. McGarrahan's opinion in the guilt phase of trial, but the Court ruled it was inadmissible. (RR47: 43-45).

(324) Nevertheless, the Court granted counsel's request to preserve Dr. McGarrahan's testimony in a bill of exception. The purpose of the bill was two-fold. First, counsel hoped to build a record to support an appellate challenge to the exclusion of the doctor's testimony. And second, Dr. McGarrahan was going to be unavailable for several days, and counsel

wished to read her testimony to the jury during the punishment phase. (RR47: 45-46; 88-89).

(325) Ultimately, however, counsel chose not to present Dr. McGarrahan's testimony in the punishment phase. Counsel explained that this was a strategic choice. Specifically, he stated:

> The defense anticipated putting on Ms. McGarrahan's testimony, however, we had some concerns about it opening up some potential *Lagrone* issues, and we haven't [sic] been informed by the State that if we would put Ms. McGarrahan on that they do intend on arguing that that opens up *Lagrone* issues.
>
> * * * *
>
> [Dr. McGarrahan] administered tests to Mr. Cade wherein we obtained his IQ information, where we obtained information that he was borderline intellectual functioning that she would have testified to. All of that was in regards to her testing him, and there were some minor background questions that were asked at that point. So that's why we have some fear that that would open up *Lagrone*, and if the State brings that up we believe that the Court will in all likelihood following line with that and so therefore we don't want to do that because that would open our client up to being interviewed by an expert of theirs in regard to future dangerousness and mitigation issues.

(RR50: 51-52).

(326) Counsel further explained that the defense would still be offering evidence related to Applicant's intellectual functioning; it would just be doing so through other testimony. Specifically, counsel stated:

> And just so the record is clear, the other considerations that we take into this is, I think that we have talked about that with some other witnesses, we talked about that with Dr. Proctor. So in doing this, we're not abandoning everything that we've already built up, obviously. But in weighing the risk factors in regards to the positives out [sic] of it, we believe that the risks

> outweigh any benefit in calling Ms. McGarrahan at this point and putting us in a situation where our client gets interviewed in the interest of these issues.
>
> (RR50: 52-53).

(327) Mr. Peale further documented the rationale for this decision in his billing notes. (State's Writ Ex. 1) (entry dated 08/28/2012 11:10 PM CDT).

(328) On inquiry by the Court, the State confirmed that it would seek to conduct further expert evaluation of Applicant for purposes of future dangerousness and mitigation. (RR50: 51, 53).

(329) In these writ proceedings, Dr. Compton, Mr. Peale, and Mr. Tatum each reiterated counsel's strategic reasons for not presenting Dr. McGarrahan's testimony at punishment. (WRR2: 92-97, 145; 246-48; WRR3: 84-85).

(330) The testimony of counsel and Dr. Compton is true and credible.

(331) Counsel's decision not to present Dr. McGarrahan's testimony in the punishment phase was a sound and reasonable strategic choice. Moreover, Applicant suffered no prejudice from the decision.

(332) Counsel's concerns about offering Dr. McGarrahan's testimony in the punishment phase were well-founded.

(333) Under *Lagrone*, the State is entitled to a mental examination of the defendant by its own expert for purposes of preparing rebuttal testimony. *See Lagrone v. State*, 942 S.W.2d 602, 609-612 (Tex. Crim. App. 1997) (holding that if a defendant introduces or plans to introduce expert testimony on future dangerousness, the State is entitled to compel the defendant to undergo an examination by the State's expert for rebuttal purposes). This rule is governed by the principle that, if a defendant breaks his silence to speak to his own mental-health expert and introduces testimony that is based on such interview, he has constructively taken the stand and waived his Fifth Amendment right to refuse to submit to a State expert. *Chamberlain v. State*, 998 S.W.2d 230, 234 (Tex. Crim. App. 1999). The precise nature or timing of the mental-health testimony is immaterial; that it is to be presented by the defendant is enough to trigger

the rule. *See id.* (holding *Lagrone* rule applicable even if the defendant plans to present expert testimony in rebuttal). The court may exclude the defendant's expert testimony if he refuses to submit to a State-sponsored examination. *Chamberlain,* 998 S.W.2d at 234.

(334) In the guilt phase, the defense only offered Dr. McGarrahan's opinion as to whether Applicant suffered from a mental disease or defect for purposes of the insanity defense. Thus, in rebuttal, the State's expert, Dr. Proctor, had only examined Applicant for purposes of insanity.

(335) By offering Dr. McGarrahan's testimony at punishment for another purpose, i.e., mitigation and lack of future dangerousness, the defense would be opening the door to the State offering its own expert rebuttal testimony on those issues.

(336) If the State had made such a request, the Court would have granted it.

(337) The risk of the State discovering or developing additional aggravating evidence in Applicant's case was real. There were aggravating facts of which the State was unaware until these writ proceedings. In particular, unbeknownst to the State, Applicant sexually assaulted Mischell or had sex with her corpse several times. Moreover, he left the scene after the murders, purchased lubricant, returned four hours later, watched or listened to pornographic recording to get aroused, and had sex with Mischell's corpse. (WRR2: 142-43; State's Writ Ex. 1 (Peale's unredacted billing notes)(entries dated 04/15/2012 05:26 PM CDT and 4/17/2012 06:36 PM CDT). If the State had sent Dr. Proctor or another psychologist back in to evaluate Applicant for rebuttal purposes in the punishment phase, these facts could well have come to light.

(338) It was also possible that Applicant would have given the State's expert information that conflicted with or varied from prior accounts given by him. As Dr. Compton noted, Applicant had already told some of the other defense experts "different things than what he had told me." (WRR2: 128, 165).

(339) In contrast to the risks it created, Dr. McGarrahan's testimony would have afforded Applicant's defense little benefit. There was other evidence of Applicant's depression, intellectual functioning, and remorse that counsel could rely on without Dr. McGarrahan's testimony.

(340) Evidence of Applicant's depression and borderline to low-average intellectual functioning came in through both Dr. Kessner and Dr. Proctor. (RR48: 77-78, 90, 126, 157-58; State's Ex. 185).

(341) Indeed, Applicant's depression and borderline to low-average intellectual functioning were virtually undisputed facts.

(342) Evidence of remorse could be inferred from Applicant's behavior during the police interview. (State's Ex. 207).

(343) To the extent counsel was relying on the State's expert testimony, the credibility and strength of the defense's argument about depression and intellectual functioning was buoyed.

(344) Based on all the above evidence, counsel was able to argue that Applicant's borderline to low-average intellectual functioning meant that he could not have planned the offense. (RR48: 202, 205-08; RR51: 101). Counsel was also able to argue that it reduced Applicant's moral culpability. (RR51: 90).

(345) Counsel was also able to argue that Applicant felt remorse for his crime. (RR48: 215: RR51: 100-01).

(346) And counsel was able to argue that Applicant was suffering from depression at the time of the offense. (RR48: 203-04, 207-08, 212; RR51: 87, 98, 102)

(347) Although Dr. McGarrahan alone would have testified to the fact that Applicant reported symptoms of PTSD, this testimony would have provided minimal, if any, benefit to Applicant's defense. Dr. McGarrahan would only opine that Applicant had reported symptoms of PTSD, not that he actually suffered from it. (RR47: 96, 104).

(348) Furthermore, although Dr. McGarrahan would testify that Applicant appeared to show remorse, she acknowledged that there was no independent way to determine whether Applicant actually felt grief over

killing the victims or whether he simply mourned the situation he found himself in. (RR47: 114).

(349) Based the foregoing, Applicant's constitutional right to effective assistance of counsel was not violated by his counsel's decision not to present Dr. McGarrahan's testimony in the punishment phase.

(350) Ground 5 should be denied.

GROUND 6: Counsel's Voir Dire of Juror John Nily

Applicant contends counsel rendered ineffective assistance during voir dire examination of Juror John Nily by not asking him about his opinions on temporary insanity. Applicant alleges that if counsel had asked Mr. Nily about this issue, they could have intelligently exercised a peremptory strike against him. (Application, pp. 85-89).

Applicant Makes an Improper Inquiry into Juror Deliberations

(351) Applicant presents no admissible evidence in support of his claim.

(352) In support of this contention, Applicant presents an affidavit from Mr. Nily in which the former juror states, "Had I been asked about my thoughts on the concept of temporary insanity during voir dire, I would have answered truthfully that I do not believe in temporary insanity." (Applicant's Ex. 19). Nily elaborates, "I do not believe that a person can be insane for a short period of time – for example, thirty minutes or so – and then go back to normal." *Id.*

(353) Rule 606(b)(1) of the Texas Rules of Evidence provides as follows:

> 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).

(354) There are only two 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).

(355) Applicant does not allege and Mr. Nily's affidavit does not establish that any juror was subjected to any outside influence. Nor does Applicant allege or demonstrate through Mr. Nily's affidavit that he was not qualified to serve on the jury.

(356) Mr. Nily's affidavit is a patent attempt to impeach the verdict by inquiring into juror deliberations, which is improper under Rule 606(b)(1).

(357) Consequently, Mr. Nily's affidavit is not competent, admissible evidence and may not be considered in support of his habeas claim. *See* Tex. R. Evid. 606(b)(1); *see also 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)).

Counsel's Decision Not to Conduct Complained-of Questioning Was Not Deficient

(358) Even assuming Mr. Nily's affidavit was considered in support of Applicant's claim, Applicant fails to demonstrate that counsel was ineffective for not questioning Mr. Nily about his feelings concerning "temporary insanity."

(359) Counsel was not deficient for not asking Mr. Nily about his opinions regarding insanity of a temporary nature because the Court, acting within its discretion, would have prohibited such an inquiry.

(360) "A trial court does not abuse its discretion by refusing to allow a defendant to ask venire members questions based on facts peculiar to the case on trial." *Raby v. State*, 970 S.W.2d 1, 3 (Tex. Crim. App. 1998) (citing Coleman v. State, 881 S.W.2d 344 (Tex. Crim. App. 1994)).

(361) Although the law authorizes an inquiry into a juror's potential biases regarding the law of insanity, queries related to the length of the episode of insanity would have been an attempt to ask Mr. Nily about the facts peculiar to Applicant's case. Thus, the Court would not have allowed it.

(362) Counsel cannot be deemed deficient for not asking a question the Court could properly have disallowed.

Defense Not Prejudiced by Counsel's Decision Not to Question Juror Regarding Temporary Insanity

(363) Even assuming such an inquiry would have been permitted, Applicant fails to demonstrate that counsel's decision not to pursue it prejudiced his defense.

(364) Applicant opines that if counsel had learned of Mr. Nily's feelings regarding "temporary insanity," counsel would have peremptorily struck him.

(365) Applicant presents no evidence that counsel would, in fact, have elected to strike Mr. Nily based on the statements made in his affidavit regarding the insanity defense.

(366) Moreover, Applicant fails to acknowledge that counsel may have reasonably chosen to accept Mr. Nily and strike another, more unfavorable potential juror instead. After all, counsel did not have any strikes left to spare; counsel exhausted all of the defense's peremptory strikes, including the two additional strikes allocated by the Court. (RR39: 114-15).

(367) Finally, Applicant neither alleges nor demonstrates that Mr. Nily was unable and did not follow his oath as a juror based on his feelings regarding "temporary insanity."

(368) In fact, in the affidavit Applicant tenders in support of this claim, Mr. Nily states, "I made my decisions at both the guilt/innocence and punishment phases based solely on the evidence that was presented in court." (Applicant's Writ Ex. 19). Thus, Applicant's own evidence affirmatively demonstrates that Mr. Nily was fair and did follow his oath.

(369) Counsel rendered effective assistance.

(370) Ground 6 should be denied.

GROUND 7: Counsel's Acceptance of Juror Brown (No. 1094B)

Applicant contends counsel should have asked the Court to remove juror James Brown from the jury after he disclosed that his daughter's co-worker was a friend of Mischell Fuller's sister. (Application, pp. 89-93).

(371) On the second day of trial, Juror Brown notified the bailiff of his daughter's co-worker's friendship with Fuller's sister. The bailiff informed the Court and a brief hearing was conducted at which this information was disclosed to counsel for both sides.

(372) In particular, Juror Brown disclosed the following:

> My daughter had a conversation with a co-worker of hers yesterday. I guess it was. The co-worker stated to her that a friend of hers was—her sister was murdered and her daughter was murdered. So based on that, I assumed she was talking about the current trial. My daughter related that information or had a conversation with my wife, my wife mentioned it to me, and I pretty much just deadpanned it and said did they show the jury, and my wife said no. No facts were discussed concerning the case by me with my daughter and/or my wife.

(RR45: 10-11).

(373) Juror Brown also stated, "[T]his co-worker of my daughter, that co-worker has been to my house for a wedding shower last year back in April, but I don't – I wouldn't know her if I saw her. She may not even know me." (RR45: 11).

(374) Lastly, Juror Brown assured the Court that he had not watched any news accounts. (RR45: 11).

(375) The Court gave Applicant's counsel an opportunity to question Juror Brown, and he asked him, "Mr. Brown has anything about that relationship had you form an opinion today about the results of this case?" Juror Brown replied, "No." (RR45: 11).

(376) Applicant's counsel asked no further questions, and the trial continued with Juror Brown. (RR45: 11).

(377) Applicant fails to demonstrate by a preponderance of the evidence that counsel's decision not to request Juror Brown's removal was deficient or that it prejudiced his defense.

(378) Applicant contends counsel was deficient for not asking the Court to remove Juror Brown because "his relationship to the victims should have supported a finding of implied bias under clearly-established law." (Application, p. 92).

(379) Counsel made a strategic decision not to request Juror Brown's removal and that decision was reasonable, not deficient.

(380) The Sixth Amendment guarantees defendants the right to a trial by a fair and impartial jury. U.S. Const. amend. VI.

(381) A judge must excuse a juror if (1) he possesses a bias or prejudice against the defendant or the law on which either party is entitled to rely, and (2) the bias or prejudice would impair the juror's ability to carry out his oath and instructions in accordance with the law. *Comeaux v. State*, 445 S.W.3d 745, 749 (Tex. Crim. App. 2014).

(382) Contrary to Applicant's assertions, neither the Sixth Amendment nor the Texas Constitution embraces the doctrine of "implied bias."

(383) The doctrine of "implied bias" is premised on a concurrence by Justice O'Connor in *Smith v. Phillips*, 455 U.S. 209 (1982), in which she opined that some "extreme situations" might give rise to a finding of implied bias. *Id.* at 222. She cited by way of example, the revelation (1) that the juror is an actual employee of the prosecuting agency, (2) that the juror is a close relative of one of the participants in the trial or the criminal transaction, or (3) that the juror was a witness or somehow involved in the criminal transaction. *Id.* Justice O'Connor's concurrence is not the law.

(384) Under both state and federal constitutional law, the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual, not implied, bias or prejudice. *Uranga v. State*, 330 S.W.3d 301, 306 (Tex. Crim. App. 2010) (citing *Smith*, 455 U.S. at 215).

(385) Counsel made an inquiry into Juror Brown's bias and concluded there was no actual bias. (RR45: 11). That conclusion is supported by the record.

(386) Juror Brown's "relationship" to the victim was tenuous and insubstantial. His connection to the victim was several times removed. Neither Juror Brown nor his daughter knew the victim's sister, much less the victim herself. The friend of Juror Brown's daughter knew only the victim's sister not the victim herself. Moreover, Juror Brown had no relationship with his daughter's friend and doubted he could even identify her on sight.

(387) Furthermore, Juror Brown's denial that he had formed any opinion based on his daughter's friend's connection to the victim's sister is credible. Not only is the connection a tenuous one, it was Juror Brown himself who brought it to the Court's attention. He deduced the connection on his own despite the fact that no names were shared. He did not even acknowledge the connection to his wife, much less discuss it with her or anyone else in any detail. And, he immediately informed the bailiff the next morning. By these actions, Juror Brown demonstrated how seriously he took his oath and duty as a juror in this trial and lent veracity to his denial of any bias. (RR45: 10-11).

(388) Even if the "implied bias" doctrine were applicable, these facts do not give rise to the type of "extreme situation" contemplated by Justice O'Connor and, thus, did not justify a finding of implied bias.

(389) Given the foregoing, if counsel had asked for the Court to remove Juror Brown based on this alleged bias against the defendant, the Court would have refused.

(390) Moreover, there is no evidence that Juror Brown's decision on Applicant's guilt and punishment was motivated in any way by the alleged bias.

(391) Consequently, Applicant was not prejudiced by counsel's decision not to request Juror Brown's removal.

(392) Applicant's right to effective assistance of counsel was not violated by counsel's decision not to seek Juror Brown's removal.

(393) Ground 7 should be denied.

GROUND 8: Counsel's Presentation of Testimony Regarding Applicant's Criminal Record During Guilt/Innocence

Applicant contends counsel was ineffective during the guilt/innocence phase of trial for eliciting testimony that Applicant is a registered sex offender, even though the trial court had previously ruled that such evidence was inadmissible during that phase of trial. (Application, pp. 93-97).

(394) Before trial, counsel filed a motion in limine regarding Applicant's prior criminal record. (CR: 212). At a pretrial hearing on August 16, 2012, the Court granted the motion in limine with the exception that the State would be permitted to introduce evidence regarding Applicant's status as a sex offender. (RR43: 5-13).

(395) During the guilt/innocence phase of trial, the defense called Applicant's half-brother Gregory Scott as a witness. (RR46: 77). Mr. Scott testified that he lost touch with Applicant after he was removed from the family as a child. (RR46: 84). Mr. Scott attended some of Applicant's football games in high school, but he stayed "on the sideline" because Scott and their mother did not get along. (RR46: 86). The following exchange then ensued:

> Q. Now, after he finished high school did you have more contact with him?
>
> A. Yes, sir.
>
> Q. And how did you have contact with him after high school?
>
> A. We just - - I was in, if you don't mind, I was in Virginia Beach for a while, and when I came back from Virginia Beach, my brother started having more contact because, well, after my mother passed away and everything, and he was, if you don't mind, ***he was on trial for something else.***
>
> Q. Right.
>
> A. And we started consulting each other. He would come to me, you know, as a big brother thing, he would come to me for advice and stuff like that.

Q. ***And that was an aggravated sexual assault - -***

A. Yes, sir, yes, sir.

(RR46: 86-87)(emphasis added).

(396) Mr. Scott further testified that Mischell was around during Applicant's trial and while Applicant was on probation for this offense. (RR46: 88). Applicant eventually served prison time for this offense. (RR46: 90). When Applicant was released, he was different. He had lost the confidence he used to have; he was "stand-offish," didn't really want to be around new people, that kind of thing." (RR46: 90).

(397) Applicant fails to demonstrate by a preponderance of the evidence that counsel's decision to present this evidence was deficient or that it prejudiced his defense.

(398) As noted above, to prove counsel was deficient, 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.

(399) Applicant also fails to demonstrate a reasonable probability that, but for counsel's decision to offer this evidence, the result of the proceeding would have been different. *Id.*

Counsel Not Deficient for Offering Evidence

(400) Counsel made a strategic choice to introduce this evidence through Mr. Scott. In the writ proceedings, counsel explained:

> We had had specific discussions – yes, especially, about that kind of splitting the baby right there, about the conviction as opposed to the registered sex offender. And there are notes in my file about that. And John and I believed that maybe we should go forward and pursue trying to keep that out. And Richard had a philosophy that, hey, look, open the doors. We want – don't want to appear like we're hiding anything here, even though we were hiding some stuff. I mean, so there's this – we want to lead [sic] a perception of being open and honest

> and not trying to hide anything and we're trying to give you everything about our client so you can make the right decision and the right decisions [sic] are life without possibility of parole. And that's part of it in building up trust.
>
> And so those things we knew were gonna come in eventually. We knew – I mean, at the punishment phase, we knew the fact that he was convicted was going to come in. There was no doubt about it. And if someone's a registered sex offender, most people, logical deduction is, well, he's not just a – I mean, how do you become a registered sex offender? Most people know. It's because you have a crime. So that's – I mean, to us it was better for the appearance – in the end, what we agreed on, it was better for the appearance of being open to trying to show them that we're trying to show you everything so that you can do what's right for this gentleman here, give him a life without the possibility of parole and get them to trust us.

(WRR3: 29-30). *See also* (WRR3: 86-87, 129-30).

(401) This strategic choice fell within reasonable professional norms.

(402) As counsel noted, the jury had already heard that Applicant was a registered sex offender. (RR44: 76, 102). From this, the jury could reasonably infer that Applicant had a conviction for a sex-related offense and possibly even served time for it. Thus, counsel merely offered additional evidence of what the jury should have already known.

(403) Furthermore, the evidence was subsequently introduced in the punishment phase, as counsel expected. By being open about it in the guilt/innocence phase, counsel could well have garnered the jury's respect and trust. (RR49: 31-69, 80-86).

(404) Also, Applicant's prior sexual-assault conviction is what ultimately precipitated his breakup with Mischell and, consequently, the murders. Thus, it was intertwined with the defense's abandonment-rage insanity theory in the guilt/innocence phase and benefitted his defense.

Defense Suffered No Prejudice from Counsel's Introduction of Evidence of Prior Sexual Assault Conviction

(405) Even assuming some deficiency in counsel's decision to offer this testimony, Applicant's defense suffered no prejudice from it.

(406) Mr. Scott's testimony merely confirmed what the jury already knew. The jury likely already deduced that Applicant had a prior sexual offense conviction from the fact that he was a registered sex offender.

(407) No details of the aggravated sexual-assault offense were introduced through the testimony.

(408) Applicant's complaint that this opened the door for the State to cross examine Mr. Scott about Applicant's aggravated sexual-assault trial is unpersuasive. The State did not go into the details of the sexual assault on cross-examination of Mr. Scott. The State only elicited testimony that Mr. Scott had testified during the punishment phase of Applicant's sexual-assault trial regarding Applicant's ability to complete probation.

(409) Applicant's complaint that this opened the door for Dr. Kessner and Dr. Proctor to refer to his time in prison is also unpersuasive. They referred to Applicant's time in prison, but they did not add any new facts.

(410) No one went into the facts of the aggravated sexual assault after it was brought up by the defense. The facts of the offense did not come in until the punishment phase.

(411) Moreover, the evidence of Applicant's guilt was overwhelming. There was no dispute that Applicant committed the murders; he turned himself in and confessed to the offense.

(412) In sum, the introduction of Mr. Scott's testimony about the prior conviction would not have altered the outcome in the guilt/innocence phase. If anything, it improved the odds of acquittal or conviction on a lesser-included offense because it supported his insanity theory.

(413) Counsel rendered effective assistance.

(414) Ground 8 should be denied.

GROUND 9: Counsel's Alleged Failure to Preserve Objection to the Admission of Applicant's Status as a Registered Sex Offender

In ground nine, Applicant contends counsel rendered ineffective assistance during the guilt-innocence phase of trial by failing to preserve their objection to evidence of his status as a registered sex offender. (Application, pp. 97-106).

(415) As discussed in connection with ground 8, the defense's motion in limine was considered at a pretrial hearing on August 16, 2012. (CR: 212; RR43: 6-13). At the hearing, the Court denied the defense's motion in limine with respect to Applicant's status as a registered sex offender. (RR43: 10-11).

(416) A motion in limine is simply a procedural device that permits a party to identify, before trial, certain rulings that the court may be asked to make at trial. *See Weidner v. Sanchez*, 14 S.W.3d 353, 363 (Tex. App.—Houston [14th Dist.] 2000, no pet.). A ruling on a motion in limine preserves nothing for review. *Wilkerson v. State*, 881 S.W.2d 321, 326 (Tex. Crim. App. 1994). The complaining party must still object when the evidence is offered in order to preserve the issue for appeal. *See id.* (citing *Gonzales v. State*, 685 S.W.2d 47, 50 (Tex. Crim. App. 1985)).

(417) As Applicant asserts, counsel never objected to any references to Applicant's status as a registered sex offender during trial, thus, forfeiting the right to raise the issue on appeal.

(418) Nevertheless, Applicant fails to demonstrate by a preponderance of the evidence that counsel's decision not to object to this evidence was deficient or that it prejudiced his defense.

(419) To prove counsel was deficient, 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.

(420) Applicant also fails to demonstrate a reasonable probability that, but for counsel's decision not to object to this evidence, the result of Applicant's appeal would have been different. *Id.*

The Complained-Of Evidence

(421) The evidence at trial showed Mischell and Applicant met while the case for which Applicant became subject to registration requirements was pending. (RR44: 92; RR46: 87-88). Mischell was present during Applicant's trial on that case, took care of Applicant's daughter when Applicant went to prison for that case, and was present in Applicant's life while he was on probation. (RR46: 87-88). The two eventually moved in together. (RR44: 69; RR46: 91).

(422) In the period leading up to the capital murder, the relationship between Applicant and Mischell had come to an end and Mischell wanted Applicant to move out of the house. (RR44: 70-71, 75). Further aggravating the tension between Mischell and Applicant during this time was the return of Mischell's ex-husband into her life and the problems caused by Applicant's status as a registered sex offender. (RR44: 76-78, 102, 105, 109-10, 134).

(423) At some point, Mischell's family learned that Applicant was a registered sex offender. Mischell had a younger brother with two children who often visited Mischell in her home. (RR44: 101-102). When the children's mother learned that Applicant was a registered sex offender, she stopped allowing the children to visit Mischell in her home. (RR44: 102). This bothered Mischell and was among the reasons Mischell wanted Applicant to move out of the house. (RR44: 76-77; State's Ex. 207A, p. 20).

(424) In one of his post-arrest interviews to detectives, Applicant claimed Mischell had been good to him until her family discovered he was a registered sex offender and Mischell's niece and nephew could no longer visit her. (State's Ex. 131A, p. 11-12; State's Ex. 207A, p. 5). He explained that Mischell's niece and nephew used to visit Mischell "all the time" until they found out he was a registered sex offender. (State's Ex. 207A, p. 5). Applicant claimed this was when Mischell began to have a problem with his sex-offender status. (State's Ex. 207A, p. 20).

(425) After killing Mischell and Desaree, Applicant wrote a suicide note in a notebook and left the notebook in the bathroom of the house. (RR45: 16; State's Ex. 124). In the letter, Applicant expresses his anger over how Mischell shut him out of her life, causing him to become a true sex offender:

> Registered sex offender. Me, Tyrone Cade. Mischell used to treat me so good. Not like a sex offender. I'm not a sex offender but now I am one. I assaulted Mischell and killed her as well. I didn't mean to kill Desaree but I did. I'm truly sorry. I'm scum. I loved this woman to death, literally. She drove me crazy with this trying to fix things between her kids and father. That's when I got kicked to the curb. It took a while but I figured it all out. I can't live without Mischell. Again, I wasn't a sex offender until now. I know God knows this although I don't believe in God. Listen to the tapes and figure it out yourself. I didn't understand this behavior from Mischell but she did it and I just snapped after leave - - after hearing that tape. My life is over so now I will end it some way, somehow. Love you all, especially Tyra Nicole Cade. I tried to cope. Your daddy.

(RR45: 17-18; State's Ex. 124)

(426) Applicant gave two interviews to detectives following his arrest – one on March 27 and one on March 28. In these interviews, Applicant explained that he sexually assaulted Mischell because she had been making him feel like a sex offender. (State's Ex. 131A, pp. 4-5). Applicant claimed he sexually assaulted Mischell for twenty to thirty minutes after stabbing her. (State's Ex. 207A, p. 4). Applicant confessed that he "sodomized" her by putting his "dick" in "both places." (State's Ex. 207A, pp. 4, 8-9).

Counsel's Decision Not to Object to Evidence that Applicant Was a Registered Sex Offender Was Not Deficient Representation

(427) Counsel's decision not to object to the evidence that he was a registered sex offender was based on reasonable trial strategy. In particular, once the Court denied the motion in limine with regard to this evidence, counsel decided to integrate it into the defensive theory, i.e., show how it related to his rejection by Mischell, which led to his episode of abandonment rage. (WRR3: 86-87, 129-30).

(428) The decision not to object was also sound because the testimony was admissible and, thus, an objection would have been fruitless.

(429) Article 38.36(a) permits both the State and the defense to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the defendant and the victim, "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) (West 2005).

(430) Evidence admissible under article 38.36 is still subject to the requirements of rules 404(b) and 403. *Smith v. State*, 5 S.W.3d 673, 678 (Tex. Crim. App. 1999). Under rule 404(b), evidence of other crimes, wrongs, or acts is not admissible to show that the defendant acted in conformity with a bad character. Tex. R. Evid. 404(b). It is admissible, however, for other purposes such as proof of motive, plan, or absence of mistake or accident. *See id.* Evidence that is relevant for purposes of rule 404(b) may still be excluded under rule 403 if probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other considerations as set out under the rule. *See* Tex. R. Evid. 403.

(431) Applicant's sex-offender status was a significant factor in the deterioration of the relationship between Applicant and Mischell. Mischell was unhappy with the fact that Applicant's status as a registered sex offender meant her niece and nephew could no longer visit her, and she wanted Applicant to move out of their home.

(432) Applicant's anger towards Mischell stemmed, in part, from her purported treatment of Applicant as a sex offender. Driven by this anger, Applicant sexually assaulted Mischell after stabbing her.

(433) Evidence of Applicant's status as a registered sex offender was relevant to show the facts and circumstances surrounding the capital murder and the relationship between Applicant and Mischell, all of which showed Applicant's mind at the time of the offense.

(434) For the foregoing reasons, the evidence was admissible under article 38.36(a) of the Code of Criminal Procedure.

(435) Evidence of Applicant's status as a registered sex offender was also admissible to prove motive under rule 404(b). Specifically, the evidence showed that, in the period leading up to the capital murder, Applicant was

angry at Mischell for treating him like a sex offender. Applicant sexually assaulted Mischell in the course of the capital murder because of the way she had made him feel about his sex-offender status.

(436) Lastly, the probative value of Applicant's status as a registered sex offender was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other considerations set out under rule 403.

Appeal Not Prejudiced By Decision Not to Object

(437) Even if counsel had objected to the admission of evidence of Applicant's status as a registered sex offender and, thus, preserved the issue for appeal, Applicant suffered no prejudice.

(438) Applicant suffered no prejudice because preserving the issue would not have altered the outcome of his appeal. As stated above, the Court's decision to admit the evidence was not erroneous. It was supported by law.

(439) Furthermore, even if the evidence of Applicant's status as a registered sex-offender was erroneously admitted, the Court of Criminal Appeals would have found the admission to be harmless.

(440) Under rule 44.2(b), an error that does not affect substantial rights must be disregarded. *See* Tex. R. App. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence on the jury's verdict or punishment. *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Evidence of the defendant's guilt is a factor to be considered in any thorough harm analysis. *Motilla v. State*, 78 S.W.3d 352, 358 (Tex. Crim. App. 2002).

(441) Evidence of Applicant's guilt was overwhelming. It was undisputed at trial that Applicant killed both Mischell and Desaree and sexually assaulted Mischell in the course of killing her. Afterwards, Applicant turned himself in to police and confessed to the offense.

(442) Under these circumstances, the Court of Criminal Appeals likely would have found that the admission of Applicant's sex-offender status had no effect on the jury's verdict in the guilt/innocence phase.

(443) Counsel rendered effective assistance.

(444) Ground 9 should be denied.

GROUND 10: Counsel's Alleged Failure to Object to Victim-Impact Testimony

Applicant contends counsel rendered ineffective assistance by not objecting to victim-impact testimony improperly offered in the guilt/innocence phase from (1) Elena Belcher (Mischell Fuller's mother and Desaree's grandmother), (2) Marva Slider (Mischell's sister and Desaree's aunt), and (3) Sandra Hopkins (Mischell's friend). Applicant argues the evidence was irrelevant to any issue in the guilt/innocence phase. (Application, pp. 106-11).

(445) Ms. Belcher's testified that:

- When Mischell was nine years old, Ms. Belcher moved the family from Belize to the United States to try to provide a better life for them. (RR44: 63).
- Mischell graduated from Irving High School in 1992. (RR44: 64).
- Although Mischell gave birth to her first child at the age of sixteen, Mischell finished high school while working mornings and evenings at Montgomery Ward. (RR44: 65-66). Mischell was a hard worker. (RR44: 66)
- Mischell's children meant everything to her and she worked three jobs to provide for them. (RR44: 66).
- Around the time of her death, Mischell was working at the Centre for Neuro Skills as a residential manager. (RR44: 66). During her fifteen years there, Mischell had worked her way up from an RA to a residential manager. (RR44: 66-67).
- Ms. Belcher and Mischell saw each other every chance they got. (RR44: 67).
- Around the time of the offense, Desaree was a high school senior and was looking forward to the prom. (RR44: 75-76).

- Desaree was scheduled to graduate that June and join the Marines. (RR44: 89).

(446) Ms. Belcher also sponsored three photographs: one of Mischell, one of Desaree, and one of Mischell and Desaree together. (RR44: 67-69; State's Exs. 5-7). She then commented on the photograph of Mischell, stating she was a very beautiful woman "inside and outside." (RR44: 69).

(447) Marva Slider testified that:

- Mischell took it "very hard" when her "baby brother" Sidney Belcher died in December 2008. (RR44: 101).
- Mischell worked to get her American citizenship in 2003. (RR44: 105-106).

(448) Sandra Hopkins testified that:

- Hopkins and Mischell worked together at the Centre for Neuro Skills and were very close. (RR44: 114).
- In March of 2011, Mischell was on her seventeenth year with the Centre for Neuro Skills. (RR44: 115).
- Mischell had started working at the Centre as a rehab assistant, working with clients with head injuries to help them relearn daily activities. (RR44: 114-115).
- By March of 2011, Mischell had worked her way up to the director of the residential setting. (RR44: 115).
- Hopkins and Mischell were not just coworkers; they were best friends. (RR44: 115).
- Hopkins and Mischell talked almost every day, whether in person, at work, or by phone. (RR44: 116).
- Hopkins was outside Mischell's house while police and paramedics arrived at the scene. (RR44: 128-129). Mischell's son Michael arrived shortly thereafter. (RR44: 130). Upon hearing the news, Michael

"screamed and hollered." (RR44: 131). Michael was so upset that he had to be restrained by some of the people at the scene. (RR44: 131).

(449) As Applicant asserts, counsel did not object to the foregoing testimony or photographs as inadmissible victim-impact testimony.

(450) Nevertheless, Applicant fails to demonstrate by a preponderance of the evidence any deficiency in his counsel's decision not to object to the preceding testimony and photographs, much less any resulting prejudice.

(451) As noted above, to prove counsel was deficient, 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.

(452) Applicant also fails to demonstrate a reasonable probability that, but for counsel's decision not to object, the result of the proceeding would have been different. *Id.*

Counsel Not Deficient for Choosing Not to Object

(453) Victim-impact evidence is evidence concerning the effect of the victim's death on the victim's family and others. *See Mosley v. State*, 983 S.W.32d 249, 261 (Tex. Crim. App. 1998). Victim-impact evidence is designed to remind the jury that murder has foreseeable consequences to the community and victim's survivors. *See Estrada v. State*, 313 S.W.3d 274, 316 (Tex. Crim. App. 2010).

(454) Victim-character evidence, on the other hand, is evidence concerning the victim's good qualities. *See Mosley*, 983 S.W.2d at 261. It is designed to give the jury a quick glimpse of the life the defendant chose to end and to remind the jury that the victim was a unique human being. *See Estrada*, 313 S.W.3d at 316. Although victim-character evidence is related to victim-impact evidence, it is still distinct from victim-impact evidence. *See Salazar*, 90 S.W.3d at

(455) "Both victim impact and victim character evidence are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence." *Mosley*, 983 S.W.2d at 262.

(456) Although victim-impact and victim-character evidence is generally inadmissible during the guilt/innocence phase of trial, some background evidence related to the victim may be admissible to show the framework and context of the offense. *See, e.g., Matchett v. State*, 941 S.W.2d 922, 931 (Tex. Crim. App. 1996) (finding no error in admission of victim's widow's testimony during guilt/innocence about length of their marriage and how many children they had, and of widow's identification of victim in a photograph of him and his friends).

Some of the Evidence Was Not Victim-Impact Evidence

(457) The complained-of evidence does not pertain to the consequences of the victims' deaths on the community or the victims' family and, thus, did not constitute victim-impact evidence.

(458) Thus, an objection that the complained-of evidence should be excluded as improper victim-impact evidence would have been meritless. *Cf. Renteria v. State*, 206 S.W.3d 689, 705-06 (Tex. Crim. App. 2006)(upholding trial court's overruling of defendant's victim-impact objection to testimony of murder victim's mother regarding victim's life because it was not a proper objection).

Some of the Evidence Had Other Relevance

(459) While most of the complained-of evidence more closely resembled victim-character evidence, some of it had other relevance.

(460) For instance, since both Elena Belcher and Sandra Hopkins testified about their knowledge of the problems between Mischell and Applicant, their testimony about how often they saw Mischell and how close they were to Mischell was relevant to the credibility of their testimony.

(461) Much of the complained-of testimony was simply background information regarding the victims and the circumstances of the offense. For instance, the three photographs of Mischell and Desaree served to identify the victims and were not improper victim-impact or victim-character evidence. *Cf. Matchett*, 941 S.W.2d at 931 (holding victim's widow's identification of husband in photograph of him with friends was not victim-impact testimony).

(462) Objecting to evidence that had relevance outside of the victims' character or the impact of their deaths would have been fruitless.

Counsel Had Sound Strategic Reasons for Not Objecting

(463) Even assuming the complained-of evidence was inadmissible as victim-impact or victim-character evidence, counsel made a reasonable strategic decision not to object to it.

(464) As counsel explained, sometimes the defense will agree to the State offering victim-impact and victim-character evidence in the guilt/innocence phase if the State forgoes offering such evidence in the punishment phase. This agreement benefits the defense because by not objecting to it, the defense looks like it is not trying to hide anything from the jury. Also, in Applicant's case, such evidence was not inconsistent with and did not impact their insanity defense. Furthermore, if the State does not re-offer such evidence in the punishment phase, then it is distanced from the defense's mitigation case. (WRR3: 128-29).

(465) It may also be reasonably deduced from the record that counsel concluded that objecting to the testimony of the victim's mother, sister, and best friend might offend the jurors. Thus, counsel chose not to object to avoid the risk alienating of the jurors.

Defense Suffered No Prejudice From Complained-Of Evidence

(466) Finally, even if counsel could have successfully excluded the complained-of evidence, the decision not to object did not prejudice Applicant's defense.

(467) Applicant argues that he was prejudiced by the admission of the complained-of evidence because it "served only to engender sympathy for the victims and inflame the passions of the jury" against him. (Application, p. 110).

(468) However, evidence of the offense itself was sufficient to engender significant sympathy for the victims and inflame the passions of the jury against Applicant.

(469) Not only were the facts of this offense gruesome and disturbing, there was no question as to who killed the two women or what precipitated the offense. Applicant turned himself in and confessed, explaining what he had done and why. It is highly unlikely the complained-of evidence made any difference in the jury's decision to find Applicant guilty.

(470) Applicant's right to effective assistance of counsel was not violated.

(471) Ground 10 should be denied.

GROUND 11: Counsel's Decision Not to Object During the State's Closing Arguments in the Guilt/Innocence Phase

In ground 11, Applicant contends counsel rendered ineffective assistance by not objecting to three occasions in which the State commented outside of the record during the closing argument in the guilt/innocence phase. Specifically, he argues that counsel should have objected when the State commented on (1) Gregory Scott's conduct as he was walking out of the courtroom; (2) a prior conversation between the State and Applicant's aunt Lannie McCullough; and (3) a prior conversation between the State and Applicant's aunt Mary Rogers.

(472) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in his counsel's decision not to object to the complained-of arguments, much less any resulting prejudice.

(473) As noted above, to prove counsel was deficient, 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.

(474) Applicant also fails to demonstrate a reasonable probability that, but for counsel's decision not to object, the result of the proceeding would have been different. *Id.*

Counsel Not Deficient For Not Objecting to State's Arguments

(475) Proper jury argument must be based on reasonable deductions from evidence in the record. *See Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997). The State may not use jury argument to directly or

indirectly reference evidence that is outside the record. *See Borjan v. State*, 787 S.W.2d 53, 57 (Tex. Crim. App. 1990).

References to Family Members Who Did Not Testify

(476) The complained-of argument about Ms. McCullough and Ms. Rogers was made in the course of pointing out that the defense had presented no credible evidence of Applicant's insanity defense:

> They don't call any family member that grew up with him and spent days with him since childhood. Lannie McCullough, who we talked to: No mental illness. Mary Rogers, his aunt who he grew up with: No mental illness.

(RR48: 227-228). Applicant claims the State argued outside the record when it referenced conversations the State previously had with McCullough and Rogers. Applicant is wrong.

(477) Dr. Tim Proctor, the State's rebuttal witness on insanity, testified on direct examination, that he had reviewed records to complement his personal interview of Applicant. (RR48: 123). Among the numerous records he had reviewed were the "summaries of interviews that were done with family members by an investigator for the district attorney's office." (RR48: 124). Those summaries detailed conversations the State had with Applicant's aunts. These conversations were attested to in the following exchange with Dr. Proctor:

> Q. Okay. And these folks that, as far as the grand jury testimony and in the interviews of family members, these are going to be people who report to be close to the defendant; is that correct?
>
> A. Right. Or who at least have some type of family relationship with him.
>
> Q. Did that include folks like Lannie McCullough - -
>
> A. Yes.

Q. - - his aunt?

A. Yes.

Q. Who basically describes herself as essentially being there from the time he was an infant until this offense, essentially.

A. Correct.

Q. And Mary Rogers as well.

A. Correct.

(RR48:124).

(478) As the above exchange shows, the State's arguments about Applicant's two aunts were not outside the record. Thus, if counsel had objected to the State's arguments on that basis, the Court could have properly overruled the objections. *See generally Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 1996) ("To successfully assert that trial counsel's failure to object amounted to ineffective assistance, the Applicant must show that the trial judge would have committed error in overruling such an objection.").

(479) Counsel was not deficient for refusing to make a meritless objection.

References to Conduct of Gregory Scott

(480) Applicant contends counsel failed to object to the following argument regarding Gregory Scott:

> Did you folks see what Gregory Scott did when he was walking out of this courtroom? How he treated the woman who was in that middle row? "Get up." That's meanness. That's control. That's domination. That's Tyrone Cade."

(RR48: 227).

(481) The Court finds that this argument was outside the record and, therefore, improper.

(482) Nevertheless, Applicant fails to rebut the presumption that counsel's decision not to object to this argument, as well as the arguments related to Applicant's aunts, was a sound strategic choice.

(483) As counsel explained during the writ proceedings, objecting may simply draw more attention to an argument that counsel does not want to emphasize. (WRR3: 28-29, 85-86).

(484) Furthermore, as counsel noted:

> [T]he judges down here give people a lot of latitude in argument and sometimes some lawyers that you know can make a fool of themselves. You have to know a little bit about that lawyer and know how bad things may or may not look. So there's – I mean, there's objection for the legal aspects of it and looking at what's clearly gonna be something that's gonna be an appellate issue, and then there's kind of giving some leeway to see if he's gonna hang himself or make things worse for himself. So, I mean, it's a fine line. If there's going to be an issue that's clearly a constitutional, objectionable issue that I think there's sound grounds for, I'm going to make it.

(485) Either of these concerns would have been a sound basis for counsel choosing to remain silent in response to the complained-of arguments.

Defense Not Prejudiced by Counsel's Decision Not to Object

(486) Regardless, Applicant's defense suffered no prejudice from any deficiency in counsel's decision not to object to the complained-of arguments.

(487) Applicant contends he was harmed by the State's arguments. His harm argument is premised on the application of an erroneous legal standard, however. In particular, Applicant relies on an assessment of harm under appellate rule 44.2. *See* Tex. R. App. P. 44.2.

(488) The disposition of Applicant's ineffective assistance claim is governed the standard enunciated in *Strickland*, not rule 44.2. Thus, Applicant is entitled

to relief only if there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *See Thompson*, 9 S.W.3d at 812 (explaining the standard under *Strickland*).

(489) Because Applicant complains only of harm at trial and not on appeal, the issue is whether there is a reasonable probability that, but for counsel's failure to object to the State's arguments, the result of Applicant's trial would have been different.

(490) The evidence of Applicant's guilt was overwhelming. There was no dispute that Applicant committed the murders; he turned himself in afterwards and confessed to the offense.

(491) Applicant contends that, but for the argument, the jury would probably have found him insane. This is an unlikely scenario. The State's arguments did little, if any, damage to Applicant's insanity defense.

(492) In rejecting Applicant's insanity defense, the jury necessarily rejected Mr. Scott's testimonial opinion about Applicant's sanity at the time of the offense. But more likely than not, the jury's rejection of Mr. Scott's testimony turned not on the State's argument about his behavior in the gallery,[9] but on the fact that he was Applicant's brother and biased as a result of that relationship.

(493) Counsel rendered effective assistance.

(494) Ground 11 should be denied.

GROUND 12: Counsel's Alleged Failure to Ensure Recording of Bench Conferences and Off-the-Record Discussions

In ground 12, Applicant contends his trial counsel rendered ineffective assistance by failing to file a pretrial motion to record bench conferences, by failing to object each time a discussion was held off the record, and by initiating "off-the-record" discussions. As a result, Applicant claims, he was deprived of his "right to a full and open review of his trial proceedings." (Application, pp. 115-21).

[9] Aside from the prosecutor's comment, the record does not reflect Mr. Scott's behavior in the gallery.

(495) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in his counsel's conduct, much less any resulting prejudice.

(496) As noted above, to prove counsel was deficient, 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.

(497) Applicant also fails to demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*

(498) Contrary to Applicant's contention, preservation of a complaint about the completeness of the reporter's record was not contingent on the filing a pretrial motion requesting that all bench conferences be recorded. Under Rule 13.1(a) of the Texas Rules of Appellate Procedure, the official court reporter must attend court sessions and make a full record of the proceedings unless excused by agreement of the parties. Tex. R. App. P. 13.1(a). Thus, the creation of a full record is not conditioned upon a request by one of the parties. It is mandatory. *See Valle v. State*, 109 S.W.3d 500, 508 (Tex. Crim. App. 2003).

(499) It is unclear whether for purposes of rule 13.1(a) the term "proceedings" also includes bench conferences. *See id.* ("We need not decide whether the current rule requires court reporters to record all bench conferences whether or not such recording is requested."). But even assuming it did, rule 13.1(a) requires an objection to preserve any error in the failure to record them. *See id.*; *see also Davis v. State*, 345 S.W.3d 71, 77 (Tex. Crim. App. 2011).

(500) As Applicant alleges, numerous bench conferences occurred off the record during his trial without any objection by counsel. Moreover, counsel requested numerous "off the record" conversations.

(501) Nevertheless, counsel's decision not to ensure recording of these conversations did not render his performance deficient. (Application, p. 119).

(502) Although Applicant cites various instances of unrecorded bench conferences, he fails to establish what error or event, if any, should have been preserved that was not. He hypothesizes about what may have been the topic of conversation in a handful of instances, but provides no evidence of the same.

(503) Furthermore, Applicant fails to acknowledge that a transcription of these conversations is not the only method by which a complete record could be ensured.

(504) Unrecorded trial proceedings may still be adequately reflected in the record if the trial court or parties subsequently state on the record what previously occurred. *See Richardson v. State*, 981 S.W.2d 453, 455 (Tex. App. – El Paso 1998, pet. ref'd) (objection and ruling adequately reflected in the record despite lack of transcript of the exchange where trial court later described exchange on the record).

(505) According to Applicant's trial counsel, they ensured the preservation of any substantive matters discussed off-the-record after the fact, and the remainder of unrecorded conversations were trivial.

(506) According to Mr. Peale, there are unrecorded bench conferences in most trials. It could be related to innocuous matters, such as scheduling or bathroom breaks. Furthermore, if the conversation were about substantive matters, once the Court got back on the record, he would have made a record about what was discussed. Mr. Tatum and Mr. Franklin were also free to memorialize any conversations they felt should be preserved. Mr. Peale also noted that Mr. Tatum, as the appellate expert on the team, kept an eye out for anything that needed to be made a part of the record. (WRR3: 30-31).

(507) Mr. Tatum and Mr. Franklin corroborated Mr. Peale's assertions. They confirmed that some conferences or conversations related to non-substantive matters, such as the need for a break. They also confirmed that they could have made a record after the fact related to any off-the-record discussion, if necessary, and any one of them could have done this. (WRR3: 87-88, 130).

(508) Mr. Peale's, Mr. Tatum's, and Mr. Franklin's recollections, beliefs, and opinions regarding preservation of the record are true and credible.

(509) Mr. Peale, Mr. Tatum, and Mr. Franklin are all skilled and experienced in preserving a record of the events that occur at trial for later review.

(510) The Court never denied the parties an opportunity to make a record of anything that occurred in an off-the-record bench conference or in-chambers conference.

(511) The Court, defense counsel, and the prosecutors all made concerted efforts to ensure a complete and accurate trial record.

(512) Many times, the Court took brief, off-the-record breaks to conduct court business on matters related to other cases or to discuss non-substantive matters, such as the need for a restroom or lunch break.

(513) Applicant contends prejudice should be presumed because so many conferences and conversations were not recorded. (Application, p. 119-20). The Court does not make such a presumption.

(514) The authority that Applicant cites in support of this proposition does not support this contention.

(515) Applicant cites *United States v. Selva*, 559 F.2d 1303, 1305 (5th Cir. 1977) for the proposition that "specific prejudice need not be shown if an appellant can establish that a substantial portion of the trial transcript is absent." (Application, p. 120). *Selva* did not address prejudice in the context of an ineffective assistance claim, however. It addressed whether a showing of specific prejudice was required under the federal rule governing loss of a portion of the record. *Id.* at 1304-05.

(516) Alternatively, Applicant claims a finding of prejudice is supported by the fact that no record exists of the conversations in which the parties discussed and agreed to excuse potential jurors during individual voir dire. He contends this void in the record makes it difficult, if not impossible, to ensure that the State's justifications were race-neutral. Also, he contends it prevents an evaluation of his counsel's voir dire performance. (Application, pp. 120-21).

(517) Applicant's contention assumes that the unrecorded conversations during voir dire related to the particular reasons each side was agreeing to excuse a potential juror. Again, Applicant presents no evidence of the same. Moreover, he fails to acknowledge the distinct and more likely possibility that any conversations between the parties about excusing a potential juror were perfunctory rather than lengthy, detailed conversations about the strengths and weakness of a particular person.

(518) Trial counsel's efforts to preserve the trial record were not deficient and Applicant suffered no prejudice from any purported deficiency.

(519) Ground 12 should be denied.

GROUND 13: Restriction on Jury's Consideration of Mitigating Evidence

In ground 13, Applicant contends the statutory mitigation instruction that was given to the jury at the end of the punishment phase violated his Eighth and Fourteenth Amendment rights under the United States Constitution. According to Applicant, the mitigation instruction found in article 37.071 is unconstitutional because it limits the categories of evidence that a jury might find mitigating.

(520) Applicant does not complain of any ruling by the Court on this matter. A complaint on post-conviction review must pertain to an adverse ruling by the trial court. *See generally* Tex. R. App. P. 33.1(a) (requiring a timely objection and an adverse ruling in order to preserve a complaint). Applicant does not complain of any adverse ruling, but merely asserts a general constitutional challenge to the mitigation provisions of article 11.071.

(521) The Court, nevertheless, notes that this complaint was raised in Applicant's pretrial Motion to Declare the Capital Sentencing Scheme Unconstitutional and Motion to Preclude Imposition of the Death Penalty, and denied by the Court. (CR 281-90).

(522) Accordingly, the Court liberally construes Applicant's ground 13 complaint to be that the Court erred in denying his pretrial motion on this issue. Applicant complained on appeal about the Court's denial of this pretrial motion, and the Court of Criminal Appeals considered and rejected it. *See Cade*, No. AP-76-883, 2015 Tex. Crim. App. LEXIS Unpub. LEXIS 156, at *127-29. Habeas corpus is not to be used to relitigate matters that

were addressed on appeal. *See Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994). Ground 13 is, therefore, procedurally barred on habeas. *See, e.g., Acosta*, 672 S.W.2d at 472 (holding it need not address on habeas matters that were addressed on direct appeal).

(523) Even assuming no procedural bar, Applicant fails to show entitlement to relief on this ground.

(524) Article 37.071 requires the Court to instruct the jury that, if the jury answers the future-dangerousness issue affirmatively, it shall answer the following issue: "Whether, 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, 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." Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e)(1) (West Supp. 2016).

(525) The Court is also required to instruct the jury that in answering this issue, it "shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." *See* Tex. Code Crim. Proc. art. 37.071, § 2(f)(4) (West Supp. 2016).

(526) Applicant claims the foregoing instructions are unconstitutional because no definition of "moral blameworthiness" is provided and because the avenues of mitigation are unconstitutionally "limited to evidence that relates solely to the defendant's culpability, the nature of his crime, [and] what the crime says about [the] defendant." (Application, pp. 123-24). Applicant further argues that the statutory instructions "precluded jurors from considering mitigating evidence unrelated to [his] 'moral blameworthiness,' a limitation wholly at odds with three decades of Supreme Court precedent." (Application, p. 125).

(527) The Court of Criminal Appeals has repeatedly rejected these complaints about the statutory mitigation instruction. *See, e.g., Lucero v. State*, 246 S.W.3d 86, 89 (Tex. Crim. App. 2008); *King v. State*, 953 S.W.2d 266, 274 (Tex. Crim. App. 1997); *Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996).

(528) Ground 13 should be denied.

GROUND 14: Arbitrary System of Administering Death Penalty

In ground 14, Applicant contends his death sentence should be reversed because it was based on an arbitrary statutory system in which prosecutors are given "considerable discretion" in deciding whether to seek the death penalty (Application, p. 126). Applicant's challenge is a facial one; he does not allege that there was anything unconstitutional or otherwise improper about the State's decision to seek the death penalty in his case.

(529) As with ground thirteen, Applicant presents no complaint about any adverse rulings at trial but generally asserts a constitutional challenge to the death-penalty statute. This particular complaint was raised in Applicant's Motion to Preclude the Death Penalty as a Sentencing Option, which was denied by the trial court (CR: 273). The Court, therefore, liberally construes Applicant's habeas complaint to be that the Court erred in denying this pretrial motion.

(530) Applicant complained on appeal, however, about the denial of this motion and the Court of Criminal Appeals rejected the complaint. *See Cade*, No. AP-76,883, 2015 Tex. Crim. App. LEXIS Unpub. LEXIS 156, at *127-129.

(531) Because habeas corpus is not to be used to relitigate matters that were addressed on appeal, this complaint is procedurally barred. *See Drake*, 883 S.W.2d at 215.

(532) Moreover, to the extent any of Applicant's present arguments about the State's discretionary authority were not raised in his pretrial motion, it is barred because it is raised for the first time on habeas. *See* Tex. R. App. P. 33.1; *Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989) (explaining that matters not raised at trial cannot form the basis for habeas relief).

(533) Even assuming no procedural bars, Applicant fails to show entitlement to relief on this ground. Applicant's facial challenge to article 37.071 is based on the argument that the statute does not provide a mechanism for the State to follow when deciding whether to seek the death penalty in capital-

murder cases. Applicant claims the statutory discretion afforded to the State has resulted in a system in which the death penalty is arbitrarily sought throughout the state of Texas. In support of this argument, Applicant points out that the number of death-penalty cases in this state varies from county to county. He also cites to studies that purportedly show that the race of both the defendant and the victim is a motivating factor behind jury verdicts in capital cases.

(534) The constitutionality of the State's discretionary authority to seek the death penalty in capital-murder cases is one that is well established. *See, e.g., McClesky v. Kemp*, 481 U.S. 279, 311-13 (1987) (discussing the "fundamental" need for prosecutorial discretion in the capital-punishment system); *McFarland v. State*, 928 S.W.2d 482, 510 (Tex. Crim. App. 1996) ("[I]t is well settled that the discretion afforded the State to seek the death penalty is not unconstitutional . . . .").

(535) Applicant's argument about the disparities in the imposition of the death penalty among the various Texas counties has previously been rejected by the Court of Criminal Appeals. *See, e.g., Threadgill*, 146 S.W.3d at 671-72.

(536) Moreover, Applicant's argument about racial disparities pertains to jury verdicts; it has nothing to do with the prosecutor's discretion to seek death.

(537) Applicant presents no novel argument or reason to justify a departure from precedent.

(538) Ground 14 should be denied.

GROUND 15: Constitutionality of Future-Dangerousness Issue

In ground 15, Applicant contends the future-dangerousness special issue is unconstitutionally vague because none of the key terms are statutorily defined. Applicant argues that, because the jury decided his punishment based on this vague special issue, his sentence was arbitrary and capricious.

(539) As with grounds 13 and 14, this ground presents no complaint about any ruling. But because this complaint was asserted in Applicant's Motion to Set Aside the Indictment (CR: 291, 293) and denied by the Court, the Court

liberally construes Applicant's complaint in ground 15 to be that the Court erred in denying this motion.

(540) Applicant complained on appeal about the Court's denial of this argument as set out in his Motion to Set Aside the Indictment, and the Court of Criminal Appeals denied the complaint. *See Cade*, No. AP-76,883, 2015 Tex. Crim. App. LEXIS Unpub. LEXIS 156, at *127-29.

(541) Because habeas corpus is not to be used to relitigate matters that were addressed on appeal, this complaint is procedurally barred. *See Drake*, 883 S.W.2d at 215.

(542) Even absent the procedural bar, however, Applicant's complaint has been rejected repeatedly by the Court of Criminal Appeals. *See, e.g., Saldano v. State*, 232 S.W.3d 77, 91 (Tex. Crim. App. 2007) (holding it has previously rejected the claim that the future-dangerousness special issue is unconstitutionally vague).

(543) For the foregoing reasons, ground 15 should be denied.

GROUND 16: Instructing Jury on Effect of Holdout Vote

In ground 16, Applicant challenges the constitutionality of what is commonly referred to as the "10-12 Rule." Although Applicant complains of no ruling, this complaint was raised in Applicant's pretrial Motion to Declare the "10-12 Rule" Unconstitutional and denied by the Court (CR: 232-251). Therefore, the Court liberally construes Applicant's complaint to be that the Court erred in denying this motion.

(544) Applicant complained on appeal about the Court's denial of this motion, and the Court of Criminal Appeals denied the complaint. *See Cade*, No. AP-76,883, 2015 Tex. Crim. App. LEXIS Unpub. LEXIS 156, at *127-29.

(545) Because habeas corpus is not to be used to relitigate matters that were addressed on appeal, this complaint is procedurally barred. *See Drake*, 883 S.W.2d at 215.

(546) Even absent the procedural bar, however, Applicant's constitutional complaint about the 10-12 Rule has been repeatedly rejected by the Court of Criminal Appeals. *See, e.g., Luna v. State*, 268 S.W.3d 594, 609 (Tex.

Crim. App. 2008); *Russeau*, 171 S.W.3d 871, 886 (Tex. Crim. App. 2005); *Sells v. State*, 121 S.W.3d 748, 768-69 (Tex. Crim. App. 2003); *Prystash*, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999); *Williams v. State*, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996); *Draughon v. State*, 831 S.W.2d 331, 338 (Tex. Crim. App. 1992).

(547) For the foregoing reasons, ground 16 should be denied.

Dr. Seth Silverman

During the writ hearing on this application, Applicant presented the testimony of psychiatrist, Dr. Seth Silverman. Dr. Silverman's testimony does not appear to pertain to any of the sixteen grounds for relief presented in the application for habeas relief. The Court makes the following findings and conclusions to address his testimony and any potential claim related to it.

Any Claim Procedurally Barred

(548) Under article 11.071, § 4(a), Applicant was required to filed his original habeas application "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." Tex. Code Crim. Proc. Ann. art. 11.071, § 4(a) (West Supp. 2016). An Applicant may obtain one 90-day extension from the trial court for good cause shown. Tex. Code Crim. Proc. Ann. art. 11.071, § 4(b) (West Supp. 2016). Any grounds available to an Applicant before the deadline for the original application that are not raised until after the deadline are considered waived. Tex. Code Crim. Proc. Ann. art. 11.071, § 4(e) (West Supp. 2016).

(549) Applicant received one statutorily-authorized 90-day extension, making his original application for habeas relief due September 10, 2014.

(550) On September 9, 2014, Applicant filed his original application raising sixteen grounds for relief. None of those grounds related to Dr. Silverman specifically or to the failure to present the opinions of a similar expert. Applicant made no mention of Dr. Silverman or his opinions until the writ hearing, was well after his deadline under article 11.071.

(551) Thus, any claim Applicant intended to premise on the testimony of Dr. Silverman would constitute a subsequent writ that must meet the requirements of section 5 of article 11.071.

(552) Unless and until Applicant obtains review pursuant to section 5, any claim related to Dr. Silverman's testimony is procedurally barred and should be dismissed.

Counsel Not Ineffective for Not Presenting Dr. Silverman's Testimony

(553) In anticipation of any ineffective assistance claim related to Dr. Silverman's testimony, the Court makes the findings set out below.

(554) Applicant fails to allege or demonstrate that the decision not to present Dr. Silverman or another expert with similar opinions fell outside reasonable professional norms.

(555) Dr. Silverman performed a general psychiatric assessment of Applicant. His opinion is premised on a clinical interview of Applicant, Dr. McGarrahan's neuropsychological testing results, the affidavits of Applicant's family and former coaches and teacher, and the MRI report. (WRR4: 8-9, 33).[10]

(556) Based on his assessment, Dr. Silverman opined that Applicant suffers from (1) brain damage, namely, a frontal lobe injury; (2) schizophrenic traits; and (3) remnants of PTSD. (WRR4: 37-38, 72-78).

(557) Dr. Silverman cannot confirm the etiology of Applicant's brain damage, but claims it could have been caused by in-utero exposure to alcohol, abuse and deprivation in childhood, football related head injuries, and two major vehicle accidents. (WRR4: 80-82).

[10] Before cross-examination, Dr. Silverman also reviewed Dr. Proctor's 2012 report, Dr. Proctor's and Dr. Price's 2016 notes, and more recent Dallas County jail records. Their contents "strengthened" his opinion. (WRR6: 8-10).

(558) According to Dr. Silverman, Applicant's brain damage has resulted in a cognitive disorder. The cognitive disorder causes Applicant to become easily overwhelmed, to make illogical responses, to get confused, and to have a difficult time interpreting the world. (WRR4: 79-80).

(559) Moreover, Dr. Silverman opines that Applicant's brain damage, schizophrenic traits, and PTSD synergistically impair his mental functioning. Specifically, they all interfere with Applicant's understanding of and response to the world around him. (WRR4: 84).

(560) Counsel's decision not to present Dr. Silverman or his opinion was not deficient and did not prejudice Applicant's defense.

(561) Dr. Silverman's credibility has been impugned in federal habeas proceedings in another death penalty case. In those proceedings, the federal district court found "serious credibility issues" with the factual information upon which Dr. Silverman based his opinions. *See Ex parte Ruiz*, Nos. WR-27,328-03 & WR-27,328-04, 2016 Tex. Crim. App. LEXIS 1341, at * 27 (Tex. Crim. App. Nov. 9, 2016).

(562) Dr. Silverman's testimony in Applicant's case suffers from credibility issues as well.

(563) Dr. Silverman is the only expert who has diagnosed Applicant with brain damage. Dr. McGarrahan, Dr. Proctor, and Dr. Randy Price have all concluded otherwise. And Dr. Kessner, Dr. Fallis, Dr. Clayton, and Dr. Flynn reported no signs of it. (WRR5: 105-06; WRR6: 147-50).

(564) Brain damage is generally detected using neuropsychological testing.

(565) Unlike Drs. McGarrahan and Price, Dr. Silverman is not a neuropsychologist and, thus, not qualified to administer neuropsychological testing.

(566) Moreover, Applicant did not display symptoms of a brain injury after his football injuries and car accidents, such as loss of consciousness or seizures. (WRR6: 96-99, 106).

(567) Dr. Silverman testified that Applicant exhibited inappropriate mood swings during his interview of him, in particular, when Applicant was describing

an incident that occurred in the prison chow line. But it is possible that Dr. Silverman misinterpreted Applicant's emotional response because he did not understand Applicant's story. (WRR6: 37-39).

(568) Moreover, Applicant displayed a normal affect and mood during his interviews with Dr. Proctor and Dr. Price. (WRR6: 108-09, 145, 150).

(569) Dr. Proctor disputed Dr. Silverman's opinion that Applicant displayed symptoms of schizophrenia, such as paranoia and auditory hallucinations. He stated that Applicant reported and exhibited no signs of either during his interview of him. Moreover, he explained that what Dr. Silverman mischaracterized Applicant's internal thought processes as "voices." Indeed, it appears Applicant reported hearing voices to improve his housing assignment in jail. (WRR6: 99-105).

(570) Applicant has no history of treatment for any psychosis; he's only ever been treated for depression. (WRR6: 107).

(571) The testimony of Drs. Proctor and Price was credible and reliable.

(572) Applicant does not suffer from brain damage, as Dr. Silverman opines.

(573) Dr. Silverman's diagnosis is unreliable and his testimony would have yielded little to no benefit to Applicant's defense in either phase of trial.

(574) Counsel rendered effective assistance of counsel in not utilizing testimony from Dr. Silverman.

(575) Any ground related to Dr. Silverman should be denied.

ORDER

THE CLERK IS **ORDERED** to prepare a transcript of all papers in cause number W11-33962-R(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 any other pleadings filed by Applicant in cause number W11-33962-R(A), including any exhibits;

2. The State's Answer to Applicant's Original Writ Application filed in cause number W11-33962-R(A);

3. Any other pleadings filed by the State in cause number W11-33962-R(A);

4. Any proposed findings of fact and conclusions of law filed by the State and Applicant in cause number W11-33962-R(A);

5. This Court's findings of fact and conclusions of law, and order in cause number W11-33962-R(A);

6. Any and all orders issued by the Court in cause number W11-33962-R(A);

7. The indictment, judgment, sentence, docket sheet, and appellate record in cause number W11-33962-R(A), 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 findings of fact and conclusions of law, including its order, to Applicant's counsel, the Office of Capital and Forensic writs (Benjamin Wolff, Jeremy Schepers, and Joanne Heisey), at 1700 N. Congress Ave., Suite 460, Austin, TX 78701, and to counsel for the State, Dallas County Assistant District Attorney Lisa Smith, at Frank Crowley Courts Bldg., 133 N. Riverfront Blvd., LB-19, Dallas, TX 75207-4399.

SIGNED the 10 day of April, 2017.

Judge Mark Stoltz, sitting by assignment
265th Judicial District Court
Dallas County, Texas

Appendix H

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-76,883

TYRONE CADE, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM CAUSE NO. F11-33962-R
IN THE 265TH JUDICIAL DISTRICT COURT
DALLAS COUNTY

HERVEY, J., delivered the opinion of the unanimous Court.

O P I N I O N

In August 2012, a jury convicted Tyrone Cade, Appellant, of capital murder for stabbing his girlfriend and her teenaged daughter to death during the same criminal transaction or pursuant to the same scheme or course of conduct. TEX. PENAL CODE § 19.03(a)(7). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, sections 2(b) and 2(e)(1), the trial judge sentenced

Appellant to death. TEX. CODE CRIM. PROC. ART. 37.071, § 2(g).[1] Direct appeal to this Court is automatic. Art. 37.071, § 2(h). Appellant raises forty-four points of error. After reviewing Appellant's claims, we find them to be without merit. Consequently, we affirm the trial court's judgment and sentence.

I. FACTS OF THE OFFENSE

The jury heard evidence that Appellant and Mischell Fuller had been romantically involved for a number of years. They had also lived together in Fuller's house for several years. Appellant's eleven year-old daughter, Tyra Cade, and Fuller's seventeen-year-old daughter, Desaree Hoskins, lived with them. Desaree was Fuller's daughter with her ex-husband, Karlton Hoskins, who was in prison when Fuller and Appellant began dating. Michael Hoskins, Fuller's older child with Karlton, lived in Denton.

Although Appellant was still living in Fuller's house at the time of the killings, their relationship had deteriorated due to various factors. One factor was Karlton's 2009 release from a Florida prison, after which he began to reestablish a relationship with Michael and Desaree. Fuller greatly encouraged Karlton's efforts. Although Karlton lived in Florida, he became a presence in Fuller's and the children's lives. Appellant, who was jealous and possessive of Fuller, disliked her contact with Karlton. He suspected Fuller of rekindling a romantic relationship with Karlton and told her that he did not want her ex-husband to call the house. Even before Karlton's renewed presence, Fuller had repeatedly

[1]Unless otherwise stated, all future references to Articles are to the Texas Code of Criminal Procedure.

asked Appellant to move out. Appellant refused, and after one such request made shortly before the killings, threatened to burn the house down with Fuller in it. Although Fuller and Appellant still slept in the same bed, they had not been sexually intimate in several months.

The killings occurred sometime in the early hours of March 27, 2011. Later that day, Appellant turned himself in by calling 9-1-1 from a pay phone in a police station lobby. After receiving *Miranda*[2] warnings, Appellant gave officers video-recorded statements in which he confessed to the killings in detail. According to his statements, on the evening of March 26, 2011, he hid a recording device near Fuller's side of the bed, then went to a strip club with his cousin. After a few hours in the club, followed by an unsuccessful search for prostitutes, Appellant returned to Fuller's house around 2:00 a.m. The recording device had captured a Skype conversation between Fuller and Karlton, and Appellant listened to it when he returned home. Roughly two hours into the recording, Appellant heard the conversation become sexual in nature.

Soon thereafter, Appellant got into bed with Fuller, who fell asleep but was later awakened by Appellant's tossing and turning in bed. When Fuller told Appellant to lie down and go to sleep, Appellant showed Fuller a kitchen knife. Fuller began screaming when she saw the knife, and Appellant repeatedly stabbed her. Fuller's screams woke Desaree, who ran into the bedroom to help her mother. Appellant stabbed Desaree several times and then

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

returned to Fuller. When Desaree started to get up, Appellant stabbed her again multiple times as she screamed and attempted to crawl away from him. When Desaree stopped screaming and moving, Appellant walked back to Fuller, who was still alive and conscious. Appellant vaginally and anally raped Fuller, claiming that he ejaculated "[i]n her, on her, everywhere" because she made him feel like a sex offender.[3] Appellant believed Fuller lived for thirty to forty minutes after he first stabbed her, and he asserted that he sexually assaulted her for twenty to thirty minutes of that time. While he was sexually assaulting Fuller, Appellant heard Desaree speaking. He believed that Desaree survived longer than Fuller.

Officers found Fuller's body in the master bedroom, face down and naked below the waist. Fuller's buttocks and vaginal area were propped up on several pillows; a bottle of lubricant lay next to her body. Desaree's body was in the hallway, immediately outside the bedroom. In a bathroom, officers found a bloody knife and notebook containing Appellant's handwritten notes. Appellant wrote that Fuller had "kicked [him] to the curb" when she began trying to mend the relationship between Karlton and her children. Appellant also wrote that, because he could not live without Fuller, he took Fuller from himself and "from . . . anyone else." Although he expressed remorse for the killings,

---

[3]When Fuller and Appellant began dating, he was facing charges in Collin County for the 1999 aggravated sexual assault of Charity Trice. As we discuss in greater detail regarding point of error fifteen, a jury subsequently convicted Appellant of that offense. The convicting court sentenced him to a three-year term of community supervision that included a ninety-day jail term as a condition of community supervision. The community-supervision conditions also required Appellant to register as a sex offender and attend a sex-offender treatment program. After Appellant was terminated from his sex-offender treatment program, the convicting court revoked his community supervision and sentenced him to three years in prison.

Appellant also frequently deflected responsibility away from himself, writing, for example, "[Fuller] used to treat me so good. Not like a sex offender"; "I'm truly sorry, she drove me crazy trying to fix things with her kids and the father"; "I feel bad for so many people, especially who knew . . . [Fuller]. All I can say is she had a bad side . . . . It wasn't always sunshine"; and "Thank Karlton Hoskins for this one."

The medical examiner, Jill Urban, M.D., testified that Fuller died from being stabbed twenty-eight times. Urban found defensive wounds on Fuller's hands and wrists. Several wounds to Fuller's face, neck, and chest area were between four and five inches deep. Desaree's death resulted from thirty-nine stab wounds, many of which were also between four and five inches deep. Urban testified that the perpetrator used a great deal of force in inflicting Desaree's injuries, noting that the wounds penetrated her bones.

II. INSANITY DEFENSE

In point of error seven, Appellant contends that the evidence of his insanity so greatly outweighed the State's contrary evidence when viewed in a neutral light that the verdict is manifestly unjust. We disagree.

Texas law excuses a defendant from criminal responsibility if he proves, by a preponderance of the evidence, the affirmative defense of insanity. *See* TEX. PENAL CODE § 8.01(a). The relevant inquiry is whether, at the time of the charged conduct, and as the result of a severe mental disease or defect, the defendant did not know that his conduct was wrong. *See id.*; *see also Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008)

(noting that "wrong" in the Section 8.01 context means "illegal"). In reviewing a rejected affirmative defense such as insanity, we consider all of the evidence relevant to that defense in a neutral light. *Matlock v. State*, 392 S.W.3d 662, 671 (Tex. Crim. App. 2013). Although the Court views the relevant evidence in a neutral light, we may not usurp the jury's function by substituting our judgment for the jury's assessment of witness credibility and the weight of the evidence. *Id.*

To support his insanity defense, Appellant offered lay testimony from his half-brother, Gregory Scott. Scott asserted that Appellant suffered from a severe mental defect and did not know his conduct was wrong when he killed Fuller and Desaree. Scott testified that he was four years older than Appellant and lived with Appellant, their mother, and Appellant's biological father, Jerry Cade Ford, until the age of six or seven. Scott, who asserted that he and Appellant came from a "crazy bloodline," testified that Ford had mental problems. After the age of six or seven, Scott lived with his grandparents. He had minimal contact with Appellant until they were both adults and their now-deceased mother became terminally ill. Scott testified that he and Appellant had difficult childhoods because their mother and Ford frequently abused each other in front of them. According to Scott, Appellant seemed different and emotionally unstable after serving a prison sentence for aggravated sexual assault. Scott also asserted that Appellant's mental state at the time of the offense was unstable, primarily due to chronic back pain that Appellant self-treated with pain patches. Scott admitted that he had

disliked Fuller and that he had suggested that Appellant place the recording device near her bed.

Appellant also presented testimony from three psychologists: Daniel Altman, Michael Gottlieb, and Gilda Kessner. Dr. Altman testified that he reviewed Ford's mental-health records, which showed that Ford had been diagnosed with schizophrenia and schizoaffective disorder. Altman told the jury that, based on heritability research and Ford's diagnoses, Appellant had a 9 18% risk of developing the characteristics of schizophrenia or schizoaffective disorder. On cross-examination, Altman acknowledged that he did not examine or purport to diagnose Appellant with schizophrenia or any other mental illness. He also stated that, in males, schizophrenia usually appears by a person's mid-twenties, and that it would be very unlikely for a thirty-eight-year-old male (Appellant's age at the time of the offense) to spontaneously develop schizophrenia. Moreover, according to Altman, the vast majority of people with mental illnesses, including schizophrenics, understand the difference between right and wrong.

Dr. Gottlieb testified that he learned through defense counsel of allegations that Appellant's mother and cousins sexually abused Appellant as a child. Gottlieb told the jury that some sexually abused children may develop psychological symptoms during adulthood. These symptoms can include internalizing and externalizing behavior, physiological symptoms, distorted perceptions as a result of their experiences, and other issues. However, the symptoms are nonspecific, meaning that they could originate from

something entirely unrelated to the earlier abuse, and there is no causal link between the earlier abuse and a particular psychological difficulty, if any, that subsequently develops. On cross-examination, Gottlieb acknowledged that he received no independent corroboration that the alleged sexual abuse actually occurred. And because he did not examine Appellant or review any of his records, Gottlieb also could not say whether Appellant actually manifested any psychological symptoms that might be consistent with childhood sexual abuse. Gottlieb further agreed that individuals who have been abused as children and develop psychological symptoms as adults are usually still able to conform their behavior to societal norms. Gottlieb offered no opinion concerning whether Appellant was insane at the time of the offense.

Defense counsel deposed Appellant's father, Ford, in anticipation of Appellant's capital-murder trial. Following Gottlieb's testimony, and in the jury's presence, counsel read a portion of Ford's deposition testimony into the record.[4] In that excerpt, Ford asserted that he discovered Appellant's mother performing fellatio on Appellant when Appellant was about two years old. Ford testified that he responded by hitting Appellant's mother in the head with a hammer and stated that Appellant witnessed him inflict the blow.

Dr. Kessner acknowledged that she worked exclusively for the defense in capital

[4]Over Appellant's objection, the trial judge excluded portions of Ford's videotaped deposition. Appellant proffered the entire deposition for purposes of appeal. The excluded portion indicates that Ford gave his testimony while hospitalized for a physical illness.

cases. Kessner testified about a mental condition she called "abandonment rage," which she acknowledged was not a diagnosis included in the American Psychiatric Association's Diagnostic and Statistical Manual. Kessner testified that a person experiencing "abandonment rage" exists in a state of autonomic arousal. She stated that such arousal limits cognitive processes and can cause an individual to lose control of his behavior. Kessner asserted that a person who is experiencing stressors such as depression, chronic pain, after-effects of childhood and adult trauma, and the threat of losing an intimate partner would be more likely to enter a state of "abandonment rage" than a person not subject to such stressors. She also asserted that an individual experiencing "abandonment rage" would not know, at the moment of violence, that his conduct was wrong. Kessner testified that there was a high probability that Appellant suffered from "abandonment rage." Kessner acknowledged, however, that she did not personally examine Appellant in preparation for her testimony.[5] Based on the information she reviewed, and after vacillating greatly, Kessner ultimately stated that is was her opinion that Appellant had a severe mental disease or defect at the time of the offense and did not know that his conduct was wrong.

In rebuttal, the State presented the testimony of Tim Proctor, Ph.D., a forensic psychologist. Dr. Proctor testified that he has worked as an expert witness for both the

[5]Kessner testified that she relied on the report prepared by the State's expert witness, Tim Proctor; the notebook found at the crime scene; some letters written by Appellant after the offense; conversations with defense counsel; and some professional literature.

State and the defense. Proctor also stated that he personally evaluated Appellant for over five hours and conducted a comprehensive record review. That review included records of the instant offense, including police reports, Appellant's 9-1-1 call, and Appellant's subsequent statements to police; the psychological evaluation conducted by mental-health staff at the jail immediately following Appellant's arrest; records of Appellant's mental-health treatment while awaiting trial; police, community supervision, and prison records associated with Appellant's prior arrests and convictions; Appellant's school, employment, and medical records; and the mental-health records of Appellant's father. Proctor testified that clinical notes reflected the staff's observations that Appellant misrepresented, exaggerated, or completely lied about his mental condition in order to be moved to a preferred-housing area. The notes further memorialized Appellant's admission that he cut his own wrist to make it look as if he were suicidal, so that jail officials would transfer him from the administrative-segregation housing unit.

Proctor told the jury that, before the offense, Appellant showed some depressive symptoms due to a back injury, but the symptoms did not rise to the level of a severe mental disease or defect or "anywhere close." Following the killings and Appellant's incarceration on capital-murder charges, psychological staff at the jail diagnosed Appellant with adjustment disorder with depressed mood and treated him with the lowest suggested therapeutic dose of a common antidepressant. Proctor described Appellant's depression as mild and stated that the adjustment disorder reflected Appellant's reaction to his current legal difficulties. Proctor also testified that neither of Appellant's current

diagnoses reached the level of a severe mental disease, and he opined that Appellant had no severe mental disease or defect at the time of the offense. Therefore, Proctor concluded, Appellant knew when he killed Fuller and Desaree that what he was doing was wrong.

After reviewing all of the relevant evidence in a neutral light, we cannot conclude that Appellant's evidence of insanity greatly outweighed the contrary evidence such that it renders the jury's determination manifestly unjust, conscience-shocking, or clearly biased. *Matlock*, 392 S.W.3d at 671. Point of error seven is overruled.

In point of error two, Appellant argues that the trial court erred by not admitting Ford's entire videotaped deposition into evidence over the State's relevance objection. *See* TEX. R. EVID. 401, 402. Appellant asserts that the excluded portion of the deposition, in which Ford discussed his own mental-health history, was relevant to Appellant's insanity defense. Appellant alleges that the trial judge's failure to admit Ford's entire deposition violated his Sixth Amendment right to due process by impeding his ability to present a complete defense. In point of error three, relying on the same arguments, Appellant alleges that the trial court erred by sustaining the State's relevance objection to the proposed testimony of Lilly Mae Ware, Ford's niece and caretaker.

When a trial court sustains the State's objection to the admission of a defendant's evidence, a federal due process violation may arise only if (1) a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence vital to his defense; or (2) the trial court's clearly erroneous ruling

results in the exclusion of admissible evidence that forms the vital core of a defendant's theory of defense and effectively prevents him from presenting that defense. *Easley v. State*, 424 S.W.3d 535, 540 (Tex. Crim. App. 2014) (quoting *Walters v. State*, 247 S.W.3d. 204, 219 (Tex. Crim. App. 2007)). Appellant does not contend that a state evidentiary rule categorically and arbitrarily prohibited him from offering the testimony at issue. Therefore, we consider only whether the trial court's rulings that excluded the remainder of Ford's deposition and Ware's proposed testimony were clearly erroneous and whether the excluded evidence was so vital to Appellant's insanity defense that its exclusion effectively prevented him from presenting that defense. *See id.*

In his excluded deposition testimony, Ford stated that he had been diagnosed with schizophrenia and bipolar disorder in his late twenties, he had been hospitalized many times due to those conditions, and he had been prescribed various psychiatric medications to treat his illnesses. Ford also described his disordered-thought processes and auditory and visual hallucinations. Ford testified that his parents had no history of mental illness and that none of his nine children had been diagnosed with any mental illness. Ware proposed to testify about the history and characteristics of Ford's mental illnesses and offer her opinion that six of Ford's children, including Appellant, had mental illness. But in her proffered testimony, Ware admitted that she was not trained to diagnose mental illnesses and had spent no significant time with Appellant.

Appellant is not entitled to relief. The trial court's rulings excluding the remainder of Ford's deposition and Ware's proposed testimony on relevance grounds were not an

abuse of discretion. *Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006). Further, the trial court's rulings did not impede Appellant's ability to present his insanity defense. *See Easley*, 424 S.W.3d at 540. The issue central of Appellant's insanity defense was whether, at the time of the offense and as the result of a severe mental disease or defect, Appellant did not know that his conduct was wrong. The excluded testimony centered on Ford's mental health, not Appellant's. Appellant presented no evidence that, like Ford, he had been diagnosed with schizophrenia or bipolar disorder. In addition, the jury learned of Ford's mental-health history and diagnoses through other witnesses, including Appellant's half-brother and Dr. Altman. Points of error two and three are overruled.

In point of error four, Appellant alleges that the trial court abused its discretion by not allowing Dr. Antoinette McGarrahan, a forensic neuropsychologist, to testify at the guilt-innocence phase that Appellant exhibited symptoms of post-traumatic stress disorder (PTSD) and depression and that he scored in the borderline range of intellectual functioning.

The trial court held a hearing to determine the admissibility of McGarrahan's testimony. McGarrahan stated that she did not evaluate Appellant for insanity at the time of the offense and had no opinion on that issue. Based on her evaluation and testing of Appellant, McGarrahan planned to testify that Appellant had borderline-to-low-average intellectual functioning and exhibited some symptoms associated with depression and PTSD. McGarrahan stated that Appellant obtained an IQ score of 80 during her testing,

but she also stated that she had no opinion regarding whether Appellant's IQ rendered him unable to understand that his conduct was wrong at the time of the offense.[6]

---

[6]Although McGarrahan declined to render an opinion as to whether Appellant's IQ score of 80 allowed him to understand that his conduct was wrong at the time of the offense, she did make general statements with respect to a person with an IQ of approximately 80,

> [PROSECUTOR]: Okay. With respect to Mr. Cade's IQ being an 80 -- and that's what your testimony is; is that correct?
>
> [McGARRAHAN]: Yes, that's what he tested at.
>
> [PROSECUTOR]: Are you representing in your opinion that that is a severe mental disease or defect?
>
> [McGARRAHAN]: No, I'm not.
>
> [PROSECUTOR]: And is it your -- so that is not your opinion?
>
> [McGARRAHAN]: Correct.
>
> [PROSECUTOR]: Have you ever rendered an opinion saying that an IQ of 80 would be a severe mental disease or defect?
>
> [McGARRAHAN]: No.
>
> [PROSECUTOR]: Is a person with an IQ of 80 able to discern right from wrong?
>
> [McGARRAHAN]: Based solely on their intellect, yes.
>
> [PROSECUTOR]: So there's nothing with respect to his IQ that would relate to an opinion of yours that at the time of the offense he did or did not have a severe mental disease or defect or that he was or was not able to understand what he was doing was wrong?
>
> [McGARRAHAN]: Correct.
>
> [PROSECUTOR]: And with respect to mental retardation, you are in no way saying the defendant is mentally retarded, are you?
>
> [McGARRAHAN]: That's correct.

McGarrahan found that Appellant exhibited a depressed affect during her evaluation, but she did not know when the symptoms first appeared or whether they played a role in his commission of the offense. She also believed that it was possible that most of Appellant's depressive symptoms stemmed from the fact that he was incarcerated and facing capital-murder charges. McGarrahan additionally acknowledged that she did not actually diagnose Appellant with PTSD, she did not know when the PTSD-like symptoms first appeared, she could not exclude the possibility that his symptoms could be entirely due to his recent commission of a double homicide, and she did not know whether the symptoms played any role in his commission of the offense.

The trial judge's decision to exclude McGarrahan's testimony at the guilt-innocence phase due to lack of relevance fell well within the zone of reasonable disagreement. *Shuffield*, 189 S.W.3d at 793. McGarrahan had no opinion regarding whether Appellant was insane at the time of the killing — the purpose for which Appellant offered her testimony. *See Easley*, 424 S.W.3d at 540. Point of error four is overruled.

III. SUFFICIENCY OF THE EVIDENCE—FUTURE DANGEROUSNESS

In point of error fifteen, Appellant contends that the evidence was insufficient to sustain the jury's affirmative answer to the future-dangerousness special issue. The future-dangerousness special issue requires the jury to determine "whether there is a

---

> [PROSECUTOR]: Can you categorically say the defendant is not mentally retarded?
>
> [McGARRAHAN]: Yes.

probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071, § 2(b)(1). When reviewing the legal sufficiency of the evidence supporting an affirmative answer to the future-dangerousness special issue, we review the evidence in the light most favorable to the verdict. *Williams v. State*, 273 S.W.3d 200, 213 (Tex. Crim. App. 2008); *see Jackson v. Virginia*, 443 U.S. 307, 318 19 (1979). Assessing the evidence and all reasonable inferences therefrom in the light most favorable to the verdict, we determine whether any rational trier of fact could have believed beyond a reasonable doubt that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Williams*, 273 S.W.3d. at 213.

Both the facts of the offense and other evidence showing Appellant's escalating pattern of violence and disrespect for the law were sufficient to support the jury's affirmative answer to the future-dangerousness special issue. *See Swain v. State*, 181 S.W.3d 359, 370 (Tex. Crim. App. 2005); *see also Devoe v. State*, 354 S.W.3d 457, 461 62 (Tex. Crim. App. 2011). Regarding the facts of the offense, we have recognized that a stabbing death is particularly brutal. *King v. State*, 953 S.W.2d 266, 272 (Tex. Crim. App. 1997). "[A] knife is a weapon which by its very nature, forces the user to be in such close proximity to his victim that he is often touching him or comes into contact with him on each blow." *Id.* (quoting *Martinez v. State*, 924 S.W.2d 693, 696 (Tex. Crim. App. 1996)). Further, "the character of the weapon is such that several thrusts are often

utilized in order to ensure death each additional thrust potentially indicating to any rational juror that such a personal act requires a wanton and callous disregard for human life." *Id.*

Here, the evidence showed that Appellant stabbed Fuller twenty-eight times and Desaree thirty-nine times, using great force to inflict deep, painful wounds. By Appellant's own estimate, Fuller and Desaree both had between thirty and forty minutes to experience the pain and terror of his attack before they died. For Fuller, this interval included a vaginal and anal sexual assault while she was dying but still conscious and able to experience pain and fear. While sexually assaulting Fuller, Appellant was aware that Desaree was still alive, within close proximity of her mother's ongoing sexual assault, and sufficiently conscious to speak. In short, the sheer brutality and depravity of the killings could convince a jury that Appellant poses a future danger to society. Even if the jury had been inclined to find that Appellant's conduct stemmed from an isolated incident of rage, it could have rationally concluded from the results that Appellant's "rage is of such an uncontrollable and extreme nature that he is a continuing danger to society." *Sonnier v. State*, 913 S.W.2d 511, 517 (Tex. Crim. App. 1995).

But the jury also heard evidence concerning Appellant's prior criminal history, which included a 1987 juvenile adjudication of delinquent conduct for burglary of a habitation, evidence that Appellant committed aggravated assault with a deadly weapon when he shot a man named Edward Watts with a shotgun in 1993, and a 1999 conviction

for the aggravated sexual assault of Charity Trice. *See Young v. State*, 283 S.W.3d 854, 864 (Tex. Crim. App. 2009) (noting that evidence the defendant had previously committed aggravated sexual assault supported the jury's finding of future dangerousness); *King*, 953 S.W.2d at 271 72 (recognizing the commission of burglary of a habitation as evidence tending to show future dangerousness). Trice testified that, when she was twenty-one-years old, she met Appellant in a laundromat and exchanged numbers with him. Eventually, she invited Appellant to have drinks with her and her co-workers after work. Trice rode to the bar with a co-worker and was there for between one and two hours before asking Appellant to drive her home. Trice had a new apartment, was proud of it, and invited Appellant in to see it. After they talked for a bit, Trice went into her bedroom and closed the door to pack because she intended to stay the night at a friend's house.

As she went to the front door to leave her apartment, Appellant grabbed her arm and refused to let her leave. Trice testified that Appellant told her that he "wanted [her] pussy" and threw her to the ground. When Trice tried to fight him, Appellant told her, "Don't make me kill you like the last girl." Because Trice believed Appellant would kill her if she did not yield to his advances, she pretended to welcome the sexual contact and led Appellant into her bedroom to get him as far from the front door as possible so she could escape. In the bedroom, Appellant never let go of her wrist as he made her remove her clothing and then engaged in vaginal intercourse with her. Afterward, Appellant

forced Trice to stand over him as he performed oral sex on her.

The moment Trice felt she could safely escape, she wrapped herself in a blanket because she was naked and ran to a neighbor's apartment where she waited for police. Trice sustained injuries to her wrist, chin, hands, and forehead. Appellant had left the scene by the time police arrived, but he left a message on Trice's answering machine the next day apologizing for the previous night. Appellant was convicted by a jury and sentenced to three years' community supervision. As a condition of his community supervision, Appellant served ninety days in jail. He was also required to register as a sex offender and attend a sex-offender treatment program.

The jury also heard evidence of Appellant's behavior and attitude following his aggravated-sexual-assault conviction. Mercedes Sabal, Appellant's community-supervision officer for that offense, asserted that, while Appellant was incarcerated, he was critical of his past decisions and expressed willingness to adhere to his community-supervision conditions. However, following Appellant's release from jail, he "had an about face," told Sabal he would not adhere to the conditions, and denied his guilt, contending that Trice consented to their encounter.

Al Merchant led the sex-offender treatment program that Appellant was required to attend. Merchant testified that, during the initial assessment, he found Appellant to be extremely manipulative. Appellant denied having sexually assaulted Trice, asserting that he and Trice were engaged in consensual sex when her boyfriend or husband interrupted

them. Merchant testified that at the first group session, Appellant continued to maintain his innocence. Appellant also attempted to cry in front of the group, a behavior that Merchant surmised was not a genuine emotional response and further exemplified Appellant's willingness to try to manipulate people. Appellant skipped his second session. At his third session, which was ultimately his last session, Appellant was evasive, argumentative, disruptive, and manipulative. As a result, Merchant testified, he terminated Appellant from the program. In the discharge summary, Merchant wrote that Appellant's recidivism risk was extremely high.

Following Appellant's termination from the treatment program, the court revoked his community supervision and sentenced him to three years in prison. Appellant's disciplinary records while incarcerated showed that Appellant was found in possession of contraband and had an altercation with another inmate, during which Appellant suffered a black eye and the other inmate suffered a fractured thumb.

The jury additionally heard evidence that, in 1993, Appellant asked his cousin, Ashton Scott,[7] to help him confront a man named Edward Watts. When the two men found Watts, Watts pointed a gun at them and Ashton left. After someone later shot Watts in the back, police officers arrested Ashton for aggravated assault with a deadly weapon. After making bail, Ashton confronted Appellant, who admitted to shooting Watts with a shotgun. Ashton asked Appellant to confess to the police, but Appellant refused. The

[7]To distinguish him from Gregory Scott, we hereafter refer to Ashton Scott as "Ashton."

police eventually dropped the charges against Ashton, and no one was convicted for shooting Watts. Ashton also testified that, in 2002, Appellant hit their uncle in the face with a beer bottle during an altercation, and that his uncle bled profusely.

Bobbi Jo Klute dated Appellant off and on for a few years in the mid 1990s. Klute testified that, while they were dating, Appellant threw a beer bottle at her vehicle windshield after the two argued in her car. She also stated that, during a period that they were not dating, Klute was at her father's house with a male friend when Appellant kicked in the door, entered the living room, and assaulted Klute's friend. On another occasion, Klute and her son were visiting her son's father, and although Klute and Appellant were not dating at the time, Appellant showed up, knocked on the door, and asked her to leave with him. Klute did so to avoid a confrontation. Appellant sometimes told Klute that if he could not have her, no one could. Klute grew afraid of Appellant and tried to end their relationship permanently, but Appellant refused to accept the decision and harassed her for months. He would call Klute from a pay phone located near her house, follow her, and enter her home without her permission while she was away.

Viewed in the light most favorable to the verdict, the evidence was sufficient to support the jury's affirmative answer to the future-dangerousness special issue. Point of error fifteen is overruled.

IV. REMAINING GUILT–INNOCENCE ALLEGATIONS

In point of error one, Appellant claims that the trial court erred by permitting

two witnesses to testify that, in March 2011, Fuller told them that Appellant had threatened her when she asked him to move out. Appellant contends that the testimony constituted inadmissible hearsay;[8] violated the Sixth Amendment's Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36, 42 (2004); and was unfairly prejudicial under Rule 403 of the Texas Rules of Evidence.[9] This point of error is multifarious because it is based on more than one legal theory. TEX. R. APP. P. 38.1; *Davis v. State*, 329 S.W.3d 798, 820 (Tex. Crim. App. 2010). However, we will review Appellant's allegations in the interest of justice.

The witnesses in question were Elena Belcher, Fuller's mother, and Sandra Hopkins, Fuller's friend. The trial court permitted Belcher to testify that, shortly before her death, Fuller said she was going to replace her smoke detector and install a house alarm because, when Fuller had asked Appellant to move out of her house, Appellant threatened to burn the house down with Fuller in it. The trial court allowed Hopkins to testify about a conversation with Fuller, during which Fuller made substantially similar statements to her.

---

[8]"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801(d).

[9]Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403. Unless otherwise stated, all future references to "Rules" refer to the Texas Rules of Evidence.

Even assuming that the trial court erred by overruling Appellant's hearsay and Rule 403 objections, the error did not affect Appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). The evidence of Appellant's guilt was overwhelming without Belcher's and Hopkins's objected-to testimony. In addition, the relevant testimony did not materially weaken Appellant's affirmative defense of insanity. In short, the testimony did not have a substantial and injurious effect or influence in determining the jury's verdict. *See Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010).

Appellant's Confrontation Clause argument also lacks merit. In *Crawford*, the Supreme Court held that the Confrontation Clause prohibits the admission of testimonial hearsay, and it stated that, at a minimum, the term "testimonial" applies to police interrogations and prior testimony at a preliminary hearing, before a grand jury, or at a former trial. *See Crawford*, 541 U.S. at 68; *Woods v. State*, 152 S.W.3d 105, 113 (Tex. Crim. App. 2004). Accordingly, our threshold inquiry is whether the statements at issue were testimonial or nontestimonial. The record shows that Fuller's statements to Belcher and Hopkins were casual remarks that she made to her mother and a friend. We have previously determined that similar casual remarks to acquaintances are nontestimonial for *Crawford* purposes. *See Woods*, 152 S.W.3d at 114. Point of error one is overruled.

In point of error five, Appellant alleges that the trial court erred in admitting State's Exhibits 109 113 (crime scene photographs) over his Rule 403 objection. Appellant contends that the photographs were unfairly prejudicial because they were

graphic and in color, most showed Fuller's breasts and genitals, and the State had minimal need for the them. Appellant asserts that the sexual-assault evidence was not essential to the State's case because the indictment did not charge him with having murdered Fuller in the course of committing sexual assault.

The record shows that Appellant did not object to the admission of the photograph marked as State's Exhibit 111. Thus, Appellant did not preserve any alleged error for our review regarding that exhibit. *See* TEX. R. APP. P. 33.1.

Regarding the remaining exhibits, Rule 403 requires that a photograph possess some probative value and that its inflammatory nature not substantially outweigh that value. *Williams v. State*, 301 S.W.3d 675, 690 (Tex. Crim. App. 2009). We review a trial court's admission of photographs over a Rule 403 objection for an abuse of discretion. *Id.* We examine several factors, including the photographs' probative value, their potential to impress the jury in some irrational and indelible way, the time needed to develop the evidence, and the proponent's need for the photographs. *Prible v. State*, 175 S.W.3d 724, 733 (Tex. Crim. App. 2005). We also consider the number of photographs, their gruesomeness, their level of detail, their size, whether they are in color or black-and-white, whether they are close-ups, whether they depict a clothed or nude body, the availability of other means of proof, and other circumstances unique to the individual case. *Williams*, 301 S.W.3d at 690. When elements of a photograph are genuinely helpful to the jury in making its decision and the photograph's power "emanates from nothing

more than what the defendant himself has done[,] we cannot hold that the trial court has abused its discretion merely because it admitted the evidence." *Sonnier*, 913 S.W.2d at 519; *see Prible*, 175 S.W.3d at 734 n.20.

The record shows that police officers found Fuller's body lying face-down on the master bedroom floor and naked below the waist. A bottle of lubricant lay next to Fuller's body. Her buttocks and vaginal area were elevated by pillows. The photographs at issue are in color and measure roughly 8 ½ x 12 inches. They reflect Fuller's body as it appeared after forensic personnel lifted her shirt and rolled her body over to gauge the extent of her injuries. To the extent that Fuller's body is shown in these photographs, she is on her back and naked except for a shirt that is pulled above her breasts.

State's Exhibit 109 shows Fuller's face and body to the knees. There are stab wounds on Fuller's face, on the area between her breasts, on her right shoulder and upper chest area, and on her upper and lower right arm. A relatively small amount of blood is visible on Fuller's skin. Heavier blood stains appear on her shirt, the bedding material underneath her, and the adjacent carpet. A bottle of lubricant near the body is partially visible at the edge of the photograph. State's Exhibit 110 is a closer view of Fuller's torso, from her navel to just below her chin. Wounds on Fuller's right shoulder and upper arm are visible, but the focus of the photograph is a stab wound between Fuller's breasts. As in State's Exhibit 109, some blood is visible on Fuller's skin. The quantity of blood that stains Fuller's shirt is more apparent than in State's Exhibit 109. State's Exhibit 112

gives a close-up view of wounds on Fuller's right shoulder and upper chest area, right-upper arm, and right forearm. Fuller's left breast, the blood-stained shirt pulled above the breast, and a portion of her neck are visible. State's Exhibit 113 shows Fuller's body from the neck to the knees. Wounds to the area between her breasts and right arm are visible, as is blood on her skin and shirt. The photograph is taken from approximately the same distance but at a slightly different angle than State's Exhibit 109. The bottle of lubricant that was only partially visible in State's Exhibit 109 is fully visible in State's Exhibit 113.

The photographs showed evidence that was directly relevant to, and probative of, the charged offense. Besides showing Fuller's wounds, the photographs corroborated Appellant's statements to police and witness testimony concerning the crime scene. *See Pribble*, 175 S.W.3d at 731. To the extent that the photographs were also probative of the sexual assault, they constituted same-transaction contextual evidence. *See id.* at 732 ("Same-transaction contextual evidence results when an extraneous matter is so intertwined with the State's proof of the charged crime that avoiding reference to it would make the State's case incomplete or difficult to understand.").

Further, the danger of unfair prejudice did not substantially outweigh the photographs' probative value. Whatever power the photographs possessed emanated primarily from what Appellant himself did. *See Sonnier*, 913 S.W.2d at 519. Under these circumstances, the trial court did not abuse its discretion by admitting State's Exhibits 109, 110, 112, and 113. Point of error five is overruled.

In point of error six, Appellant alleges that the trial court erred by refusing to give his proposed instruction on the lesser-included offense of murder:

> If all of you do not agree by a preponderance of the evidence that as a result of a severe mental disease or defect, the defendant did not know that his conduct was wrong when he intentionally or knowingly caused the death of [Fuller], but all of you agree that by preponderance of the evidence as a result of a severe mental disease or defect, the defendant did not know that his conduct was wrong when he intentionally or knowingly caused the death of [Desaree,] then you will find the defendant not guilty by reason of insanity as to the offense of capital murder [and] then you will consider whether the defendant is guilty of the offense of murder of [Fuller].

We apply a two-step analysis to determine whether the jury should receive a lesser-included offense instruction. *State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013). First, we ask whether the lesser-included offense's elements are included within the proof necessary to establish the charged offense's elements. *Id.* at 162. If they are, we then inquire whether the record includes evidence that could allow a rational jury to find the defendant guilty of only the lesser-included offense. *Id.*; *see* Art. 37.09; *Feldman v. State*, 71 S.W.3d 738, 750 51 (Tex. Crim. App. 2002).

Appellant meets the first prong of the test; we have repeatedly held that murder is a lesser-included offense of capital murder. *See, e.g.*, *Smith v. State*, 297 S.W.3d 260, 275 (Tex. Crim. App. 2009). However, Appellant does not satisfy the second prong. Appellant points us to the general circumstances of the offense and his statements in which he professed an inability to explain why he killed Desaree. But as the State notes, this evidence suggests that Appellant lacked a motive to kill Desaree. It does not provide a

rational basis for finding that, due to a severe mental disease or defect, when Appellant stabbed Desaree thirty-nine times, he did not know that his conduct was wrong.

Further, the evidence does not support a finding that Appellant's state of mind when he killed Desaree was different from his state of mind when he killed Fuller. Dr. Proctor, the State's expert, testified that Appellant was sane during both killings. Appellant's expert, Dr. Kessner, opined that Appellant was insane during both killings because he was in a state of "abandonment rage" and autonomic arousal from the moment Fuller screamed (upon seeing Appellant in her bed with a knife) until "the violence stopped." For the jury to find Appellant guilty of the lesser-included offense, it would necessarily have to disregard both Proctor's and Kessner's testimony. It would have to find that Appellant was thinking rationally when he began to stab Fuller, but he then entered a state of autonomic arousal (i.e., became insane) when Desaree entered the bedroom, and he began stabbing her. He then regained rational thought when he stopped stabbing Desaree and returned to stabbing Fuller. Finally, he returned to a state of autonomic arousal (i.e., became insane again) when Desaree began to get up, and he stabbed her multiple additional times. In short, the evidence could not allow a rational jury to find Appellant guilty of only murder. *See Feldman*, 71 S.W.3d at 750 51. Point of error six is overruled.

V. REMAINING PUNISHMENT-PHASE ALLEGATIONS

In points of error eight through ten, Appellant challenges the trial court's rulings excluding the punishment-phase testimony of his expert witnesses, Mark Vigen, Ph.D. (point of error 8) and Jonathan Sorensen, Ph.D. (point of error 9), and admitting the testimony of the State's expert, Travis Turner (point of error 10). Appellant alleges that the trial court should have permitted Vigen, a psychologist, to testify that there was a high probability that the Texas Department of Criminal Justice (TDCJ) could control Appellant if the jury sentenced him to life without parole. Next, Appellant asserts that the trial court should have allowed Sorensen, who holds a criminal-justice doctorate, to testify that individuals convicted of homicides involving intimate partners are less likely than other inmates to commit violence in prison. Finally, Appellant contends that the trial court should not have permitted Turner, a TDCJ classification officer, to testify about the types of weapons that prison inmates make.

The record shows that Turner first testified at a hearing outside the presence of the jury and later in the presence of the jury during the State's punishment case-in-chief. During the hearing outside the presence of the jury, Appellant objected on relevance grounds to Turner's proposed testimony about the kinds of inmate-made weapons he had encountered during his TDCJ career. Appellant argued that other inmates made the weapons in question, and that Appellant was not imprisoned when the discussed weapons were found. The trial court overruled the objection, and Turner was excused. Later, when the State recalled Turner in the presence of the jury, Turner testified about TDCJ's

inmate-classification system, living conditions and restrictions within each classification of inmate, the general kinds of violence and disciplinary infractions that sometimes occur in prison, and the kinds of weapons that inmates have made. Turner offered no testimony relating specifically to Appellant.

After the State rested its punishment case, Appellant called Johnny Lindsey to testify. Lindsey, who told the jury that he spent twenty-six years in TDCJ for aggravated sexual assault until being exonerated by DNA testing, testified about the prison environment. On cross-examination, without a defense objection, Lindsey stated that inmates commonly made and possessed shanks.

After Lindsey testified, the trial court held a hearing outside the jury's presence to determine the admissibility of testimony to be offered by defense witnesses S.O. Woods, Sorensen, and Vigen as experts. *See* TEX. R. EVID. 702. Woods, a retired TDCJ classifications officer, proposed to clarify aspects of Turner's testimony regarding TDCJ's inmate-classification system and ability to control inmates. After questioning Woods briefly, the State indicated that it did not object to his proposed testimony. Next, Sorensen stated that he proposed to testify that inmates convicted of intimate-partner homicides are less likely to commit acts of violence in prison than other inmates. The basis of Sorensen's opinion was his research, i.e., a study of TDCJ inmates convicted of capital murder, murder, or manslaughter that involved the killing of an intimate partner.

The trial court continued the hearing to allow Sorensen to retrieve a copy of his

research. In the meantime, the jury heard testimony from two defense witnesses, one of whom was Woods. On direct examination, Woods testified about TDCJ's inmate-classification system and ability to control inmates. On cross-examination, and without a defense objection, Woods testified that prison inmates are very creative and can fashion almost anything into a weapon, including shoe laces, combs, and handkerchiefs. Like Turner, Woods offered no testimony specifically related to Appellant.

When the hearing resumed, the State elicited testimony from Sorensen that his study was the first of its kind, incomplete, had not been peer reviewed or published, and no one had replicated his study's results. Sorensen acknowledged that, although successful peer review is some indication that a study "seems to look okay," replication of a study's results, rather than peer review, validates the study. At the end of Sorensen's hearing testimony, the trial court stated that it would review *Kelly v. State*, 824 S.W.2d 568, 572 73 (Tex. Crim. App. 1992), before deciding whether it would permit Sorensen to testify before the jury.

The trial court then heard from Vigen. Vigen stated that he had reviewed some offense and TDCJ records related to Appellant's conviction and imprisonment for aggravated sexual assault, but he had not personally examined him. Vigen proposed to testify that TDCJ "has a high probability of controlling individual inmates." He also stated that he based his opinion on thirty-five years of working as a psychologist in Texas prisons; five articles on prison violence written by other people including Sorensen;

Vigen's own co-authored article, in which he summarized research "indicating that a majority of death row inmates do not exhibit violence in prison even in more open institutional settings"; and Turner's and Woods's testimony before the jury. Although Vigen initially asserted that he would not offer an opinion specific to Appellant, he ultimately stated that he would testify that there was a high probability that TDCJ could control Appellant, in particular. When asked whether he based his opinion on anything individual to Appellant, Vigen acknowledged that he had not evaluated Appellant but noted that he had listened to Turner's and Woods's testimony.

The State objected to Vigen's proposed testimony. It argued that Vigen was not "qualified" to render an opinion about the probability that TDCJ could control Appellant because Vigen had reviewed very little information about the case, had not been present throughout the entire trial, and had not interviewed Appellant. Appellant countered that the State's argument concerned the weight to be given to Vigen's opinion, rather than Vigen's qualifications to render it. The trial judge ruled Vigen's testimony was inadmissible. After recessing to review *Kelly*, the trial judge also excluded Sorensen's testimony.

Rule 702 governs the admission of expert testimony. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). It states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

education may testify thereto in the form of an opinion or otherwise." Rule 702. For evidence to be admissible under Rule 702, the proponent must demonstrate by clear and convincing evidence that the expert testimony is sufficiently reliable and relevant to assist the jury in reaching accurate results. *Everitt v. State*, 407 S.W.3d 259, 263 (Tex. Crim. App. 2013).

Reliability in this context "refers to the scientific basis for the expert testimony." *Id.* (citing *Jordan v. State*, 928 S.W.2d 550, 553 54 (Tex. Crim. App. 1996)). Where, as in Appellant's case, the expertise involves a "soft" science,[10] the proponent may establish reliability by showing that (1) the field of expertise at issue is a legitimate one, (2) the subject matter of the expert's testimony falls within the scope of that field, and (3) the expert's testimony properly relies on or utilizes the principles involved in that field. *See Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998). In making its admissibility determination, the trial court may consider seven other factors that potentially affect reliability: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such community can be ascertained; (2) the testifying expert's qualifications; (3) the existence of literature supporting or rejecting the underlying scientific theory; (4) the technique's potential rate

[10] *Weatherred v. State*, 15 S.W.3d 540, 542 n.5 (Tex. Crim. App. 2000) ("The 'hard' sciences, areas in which precise measurement, calculation, and prediction are generally possible, include mathematics, physical science, earth science, and life science. The 'soft' sciences, in contrast, are generally thought to include such fields as psychology, economics, political science, anthropology, and sociology.").

of error; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific technique can be explained to the court; and (7) the experience and skill of the person who applied the technique on the occasion in question. *State v. Medrano*, 127 S.W.3d 781, 784 n.4 (Tex. Crim. App. 2004).

"Relevance refers to the 'fit' of the scientific principles to the evidence at hand." *Everitt*, 407 S.W.3d at 263. "Relevance is a looser notion than reliability and is a simpler, more straightforward matter to establish." *Tillman*, 354 S.W.3d at 438 (internal quotation marks omitted); *see Jordan*, 928 S.W.2d at 555 (noting that expert testimony is relevant under Rule 702 if it will assist the trier of fact and is sufficiently tied to the facts of the case). Although relevance is the less demanding of the two required showings for admissibility under Rule 702, we have emphasized that the proponent will not always satisfy it. *See Jordan*, 928 S.W.2d at 555. "[T]he issue under the reliability and relevance conditions is whether the expert's testimony took into account enough of the pertinent facts to be of assistance to the trier of fact on a fact in issue." *Vela v. State*, 209 S.W.3d 128, 133 (Tex. Crim. App. 2006) (internal quotation marks omitted).

We review a trial court's decision to admit or exclude expert testimony for an abuse of discretion. *Tillman*, 354 S.W.3d at 435. We will not reverse if the trial court's decision falls within the zone of reasonable disagreement or is correct under any theory of law applicable to the case. *State v. Esparza*, 413 S.W.3d 81, 85 (Tex. Crim. App. 2013).

Appellant contends that the trial court should have permitted Vigen to testify about

TDCJ's ability to control Appellant because Vigen reviewed, and based his opinion on, Appellant's prison records, some offense reports concerning Appellant's aggravated-sexual-assault conviction, Woods's and Turner's testimony, and relevant research in his field. Alternatively, Appellant asserts that the trial court should have permitted Vigen to testify through answers to hypotheticals that Appellant would not be a future danger in prison.

To the extent Vigen proposed to testify about the probability that TDCJ could control Appellant, the trial court's ruling fell within the zone of reasonable disagreement. The record does not support Appellant's assertion that Vigen based his opinion on any information specific to Appellant. At the admissibility hearing, the State asked Vigen repeatedly about the bases for his opinion, and Vigen responded by listing his own experience, articles that were not specific to Appellant, and Turner's and Woods's testimony before the jury. Vigen did not include his review of Appellant's prison record and offense reports related to Appellant's aggravated-sexual-assault conviction as a basis for his opinions. Further, neither Turner nor Woods offered testimony specific to Appellant. The trial court did not abuse its discretion when it precluded Vigen from testifying about the probability that TDCJ could control Appellant.

To the extent Appellant argues that the trial court should have allowed Vigen to testify via hypotheticals that Appellant would not be a future danger in prison, the record does not show that Appellant suggested this alternative to the trial court. In responding to

the State's objection to Vigen's proposed testimony, defense counsel argued:

> Many times mental health professionals are given hypotheticals and asked to render opinions about future dangerousness and [sic] certainly qualifies within that category and meets the test of [*Nenno*] on the soft sciences that he's qualified to give an expert opinion. Any objection would go to the weight. There's no question about his qualifications and he's been qualified to testify in other death penalty cases [sic] the same or similar type of issues.

Although counsel mentioned the word "hypotheticals," it was in the context of an argument that the trial court should allow Vigen to testify that TDCJ would be able to control Appellant. The trial court cannot be fairly expected to have known from counsel's argument that, if the trial court did not allow Vigen to testify about TDCJ's ability to control Appellant, then Appellant wished to put Vigen on the stand to testify about Appellant's future dangerousness via hypotheticals. And when the trial court ruled that Vigen's testimony was inadmissible, Appellant did not seek clarification of the ruling's scope. To the extent he would have otherwise presented Vigen's testimony in the form of hypotheticals, Appellant failed to preserve any complaint. *See* TEX. R. APP. P. 33.1(a). Point of error eight is overruled.

Sorensen proposed to offer an opinion based on the results of a novel and incomplete study that had not been peer-reviewed, published, or replicated. The trial court acted within its discretion when it found Sorensen's testimony inadmissible under Rule 702. *See Coble*, 330 S.W.3d at 277 80; *Medrano*, 127 S.W.3d at 784 n.4. Point of error

nine is overruled.[11]

We do not reach the merits of point of error ten concerning the admission of Turner's testimony because, even if it was error for the trial court to admit Turner's testimony, Appellant was not harmed by that admission. "[W]hen a defendant offers the same testimony as that objected to, or the same evidence is introduced from another source, without objection, the defendant is not in position to complain on appeal." *See Hughes v. State*, 878 S.W.2d 142, 156 (Tex. Crim. App. 1992) (quoting *Stoker v. State*, 788 S.W.2d 1, 13 (Tex. Crim. App. 1989)). Although Appellant objected to Turner's testimony concerning weapons made by inmates, he did not object when Lindsey and Woods gave substantially the same testimony. Point of error ten is overruled.

In point of error eleven, Appellant argues that the trial court erred when it denied his request for a mistrial after Sabal, his former community-supervision officer, testified that he failed a polygraph while on community supervision for aggravated sexual assault. Although polygraph evidence is generally not admissible in Texas courts, the trial court did not abuse its discretion by denying Appellant's motion for mistrial. *See Ex parte Bryant*, 448 S.W.3d 29, 40 (Tex. Crim. App. 2014); *Leonard v. State*, 385 S.W.3d 570, 573 n.2 (Tex. Crim. App. 2012).

---

[11]In response to Appellant's eighth and ninth points of error, the State Prosecuting Attorney's Office has filed a postsubmission brief urging this Court to overrule *Berry v. State*, 233 S.W.3d 847 (Tex. Crim. App. 2007). The State Prosecuting Attorney argues that our holding in *Berry* is implicated by the question of whether the testimony of Drs. Vigen and Sorensen was relevant. We decline the invitation in this case because, as discussed above, this Court is able to resolve both points of error without deciding the relevancy issue.

Sabal's complained-of testimony occurred during the State's direct examination. Sabal testified that, following Appellant's termination from a mandatory sex-offender-treatment program, an arrest warrant issued, and the district attorney filed a motion to revoke Appellant's community supervision. He also asserted that Appellant knew that the termination endangered his community supervision and that Appellant acted "to extend his stay in the community." When the prosecutor asked Sabal to explain what she meant by that phrase, she answered,

> When a sex offender is unsuccessfully discharged from treatment[,] then we need to find another treatment provider that's going to accept that defendant into their program. That is not an easy thing to do once the offender has been discharged from treatment, especially for the reasons [Appellant] was discharged. . . . [I]t was difficult to find sex offender treatment providers who would accept an offender who was discharged because [he was] denying the offense for which [he] was placed on [community supervision] and had failed a polygraph.

The defense objected, arguing that Sabal's statement about the polygraph was irrelevant and highly prejudicial. The trial court sustained the objection and instructed the jury to disregard the statement, but it denied Appellant's subsequent request for a mistrial. The record reveals no further reference to the polygraph result by either party.

We review a trial court's denial of a motion for mistrial for an abuse of discretion, and will uphold the ruling if it falls within the zone of reasonable disagreement. *Coble*, 330 S.W.3d at 292. Here, the alleged grounds for mistrial arose from Sabal's apparently unanticipated answer to the State's question. This scenario is most closely aligned with cases in which a bystander or witness made a spontaneous outburst that interfered with

the normal proceedings of a trial. *See, e.g.*, *id*. at 291 92; *Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009); *see also Williams v. State*, 643 S.W.2d 136, 138 (Tex. Crim. App. 1982) (discussing a State witness's unresponsive answer, which inadvertently placed information prejudicial to the defendant before the jury). In those instances, we held that the denial of a motion for mistrial would not result in reversible error unless the defendant showed the existence of a reasonable probability that the outburst interfered with the jury's verdict. *Coble*, 330 S.W.3d at 292 (citing *Stahl v. State*, 749 S.W.2d 826, 829 (Tex. Crim. App. 1988) (op. on reh'g)). In the context of bystander or witness outbursts, we generally consider a trial court's instructions to disregard sufficient to cure the impropriety because we presume that the jury will follow those instructions. *Coble*, 330 S.W.3d at 292; *see also Williams*, 643 S.W.2d at 138 (noting the general rule that an instruction to disregard is sufficient to cure prejudice from a nonresponsive answer given by a State's witness).

Appellant argues that we should not apply our normal presumption concerning the sufficiency of an instruction to disregard because Sabal disclosed the results of the polygraph, as well as the fact that Appellant took such a test. In support, Appellant relies on *Robinson v. State*, 550 S.W.2d 54, 59 61 (Tex. Crim. App. 1977), *Nichols v. State*, 378 S.W.2d 335, 338 (Tex. Crim. App. 1964), and *Jones v. State*, 680 S.W.2d 499, 502 (Tex. App. Austin 1983, no pet.). He contends that these cases stand for the proposition that an instruction to disregard is insufficient to cure harm when the jury learns of a

polygraph's results. Relying on *United States v. Murray*, 784 F.2d 188 (6th Cir. 1986), Appellant also asserts that we should not apply the presumption because we should consider Sabal a government agent who referred to the polygraph's result in bad faith. However, all of the cases upon which Appellant relies are distinguishable.

In *Robinson* and *Nichols*, the prosecution bolstered the testimony of key guilt-innocence phase witnesses concerning the charged offense. *Robinson*, 550 S.W.2d at 59 (stating that the accomplice-witness's testimony was vital to the State's capital-murder prosecution); *Nichols*, 378 S.W.2d at 336 (noting that the State's statutory-rape case depended entirely on the 14-year-old complainant's testimony). The prosecution did so in *Nichols* by asking the victim if she had taken a polygraph and in *Robinson* by repeatedly eliciting testimony that these witnesses had taken, and passed, polygraphs regarding their accounts of the charged offense. *See Robinson*, 550 S.W.2d at 56 59; *Nichols*, 378 S.W.2d at 336 37. In *Jones*, the prosecution impeached the defendant's punishment-phase testimony, in which she asserted that she killed the victim accidentally. *Jones*, 680 S.W.2d at 500 01. It did so by obtaining the defendant's admission on cross-examination that she had taken a polygraph and lied in response to several questions. *Id.* at 502. The State also elicited testimony through another witness that the polygraph examiner believed the defendant had lied when she denied her part in the murder. *Id.* In *Murray*, an experienced FBI agent who investigated the defendant for mail fraud testified at the guilt-innocence phase of the defendant's later trial on those charges. *See Murray*, 784 F.2d at

188. During his testimony, the agent referred to the fact that the defendant had taken a polygraph regarding the charged offense. *Id.* The panel majority found that the agent's reference to the test was deliberate and that the trial court's instruction to disregard the comment was inadequate to cure the error. *Id.* at 188 89.

In Appellant's case, the record does not support a finding that the prosecutor's question was designed to elicit testimony concerning the polygraph or that the prosecutor could have reasonably anticipated the reference. Further, the record shows that the prosecutor did not mention the polygraph or result after Sabal's fleeting reference. In addition, Sabal's reference occurred during the punishment phase, when the potential for prejudice was less than if it had occurred at the guilt-innocence phase. *See Coble*, 330 S.W.3d at 293. Also, Sabal's brief mention of the examination's result concerned the circumstances in which the convicting court revoked Appellant's community supervision for an extraneous offense. Sabal's reference did not concern a polygraph in which Appellant or a witness submitted to questioning about the capital murder for which Appellant was then on trial. The record also does not support Appellant's assertion that Sabal's reference to the polygraph and its result was the product of bad faith.

After review, we find no reasonable probability that Sabal's objected-to testimony interfered with the jury's punishment verdict. The evidence supporting the jury's answers to the punishment-phase special issues was substantial. Sabal's reference to the polygraph's result was brief, unsolicited, and concerned an extraneous matter; further, the

State did not attempt to capitalize upon the reference. *See Coble*, 330 S.W.3d at 293. Under these circumstances, Appellant has not overcome the presumption that the trial court's instruction to disregard was sufficient to cure any harm that may have otherwise resulted from the objectionable testimony. Point of error eleven is overruled.

In point of error twelve, Appellant argues that the trial court erred by allowing two of Desaree's friends, Allison Nelson and Justus Rodgers, to give victim-impact testimony. Appellant asserts that their testimony was improper because the State did not elicit their testimony in response to defense mitigation evidence and because close relatives were available to provide victim-impact testimony. But Appellant has failed to preserve this complaint because his argument on appeal does not comport with his objection at trial. TEX. R. APP. P. 33.1; *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014). At trial, the sole basis for Appellant's objection was that Nelson and Rodgers were not family members. The trial court overruled the objection, finding the testimony admissible under *Mosley v. State,* 983 S.W.2d 249, 263 (Tex. Crim. App. 1998) (concluding that victim-impact testimony is not rendered improper merely because the witness is not a family member). Point of error twelve is overruled.

In point of error thirteen, Appellant contends that the trial court erred when it declined to include the following jury instructions in the punishment charge:

> No juror has to agree with [any] other juror as to what is [a] mitigating circumstance or set of circumstances that justifies a sentence of life. The duty to deliberate only requires that each juror give careful consideration to the evidence in the issue that you are to consider to give an individual true

> verdict according to the law and the evidence.
>
> No juror is to be swayed by mere sentiment, conjecture or sympathy for the deceased or family of the deceased, nor are you to consider any prejudice or public opinions or public feeling that may exist against [Appellant] in considering an answer to Special Issue No. 2.
>
> During your careful consideration of the special issues, each juror is entitled to his or her own personal moral judgment as to the right answer for these issues.

Appellant asserts that the proposed instructions were all part of the law of capital jurisprudence and were necessary to guide the jury so that it would apply the death penalty in a constitutional manner.

Appellant's argument lacks merit. Article 37.071, subsection (e), sets forth the law applicable to the mitigation special issue. The trial court's charge tracked that statutory language. *See Martinez*, 924 S.W.2d at 699 ("Following the law as it is set out by the Texas Legislature will not be deemed error on the part of the trial judge."). Point of error thirteen is overruled.

In point of error fourteen, Appellant asserts that the trial court reversibly erred by overruling his objection to the State's allegedly improper punishment-phase argument. Appellant contends that the State misstated the law by suggesting that the death penalty would be a proper verdict based only on an affirmative answer to the future-dangerousness special question. He argues that Texas law "presumes that a life sentence is appropriate and a death sentence [inappropriate]" unless the jury answers the future-dangerousness special issue in the affirmative and the mitigation special issue in the

negative.

The record shows that, after correctly stating the two special issues, the prosecutor linked the evidence presented at trial to them. *See* Art. 37.071, § 2(b)(1), 2(e)(1). The prosecutor first focused on the offense facts, arguing that the "horrific[,] senseless, unjustified violence" Appellant had inflicted was relevant to both special issues and showed that Appellant was the type of person who "deserv[ed] a death sentence" "exactly what Special Issue 1 and 2 are about." She also drew the jury's attention to the evidence of Appellant's extraneous offenses and other bad acts, arguing that they constituted additional reasons for the jury to return an affirmative answer to the future-dangerousness special issue. After asking the jury to return an affirmative answer on future dangerousness, the prosecutor segued into her argument concerning the mitigation issue:

> The answer to Special Issue No. 1 is yes. What the State of Texas asks [is] that you vote that way, all of you, and you move on to Special Issue No. 2.
>
> Now on this special issue, we don't have the burden of proof, [and] neither does the defense. It's left up to you. And [Special Issue No. 2] really asks you is there anything that is sufficiently mitigating to warrant that he shouldn't have the death sentence that you've already determined that he deserves by the answer of yes to Special Issue No. 1.

Appellant objected to the last sentence of the passage set forth above, arguing that it misstated the law because "the death sentence is not imposed until all questions are answered." The trial court overruled the objection.

We perceive no misstatement of law. The prosecutor did not argue that Appellant could lawfully receive a death sentence based only on an affirmative answer to the future-dangerousness special issue. The State's argument was reasonably understood as a hypothetical, in which it posited that the jury had already answered "yes" to the future-dangerousness special issue and was beginning to deliberate on the mitigation issue. Once the jury has made an affirmative finding concerning future dangerousness, a defendant's sentence is presumptively death unless, after considering the mitigating evidence presented to it, the jury also answers the mitigation special issue in the affirmative or deadlocks on that issue. *See* Art. 37.071, § 2(g). Point of error fourteen is overruled.

VI. VOIR DIRE—*BATSON* CHALLENGES

In points of error fifteen and sixteen, Appellant alleges that the trial court erred in denying his *Batson*[12] challenges to the State's use of peremptory strikes against African-American veniremembers Viola Brimmer and Leamon Parker. Appellant, who is African-American, contends that racial discrimination motivated the strikes.

In *Batson*, the United States Supreme Court held that the Equal Protection Clause forbids a prosecutor from exercising peremptory strikes based solely on the basis of a potential juror's race. *Nieto v. State*, 365 S.W.3d 673, 675 (Tex. Crim. App. 2012). A *Batson* challenge involves a three-step process. *Blackman v. State*, 414 S.W.3d 757, 764 (Tex. Crim. App. 2013). First, the defendant must make a prima facie showing of racial

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

discrimination. *Nieto*, 365 S.W.3d at 676. In the second step, the burden of production shifts to the prosecutor, who must articulate a race-neutral explanation for the strike. *Id.* Finally, the trial court determines whether the defendant has proved purposeful discrimination. *Id.*

The trial court's ruling on the purposeful-discrimination step must be upheld unless it is clearly erroneous. *Id.* In determining whether clear error occurred, we are not limited to the arguments or considerations that the parties specifically called to the trial court's attention; rather, we look to the entire record of voir dire. *Blackman*, 414 S.W.3d at 765. We review the evidence in the light most favorable to the trial court's ruling. *Young v. State*, 283 S.W.3d 854, 866 (Tex. Crim. App. 2009).

The record shows that Brimmer's individual voir dire took place before Judge Quay Parker.[13] Lead prosecutor Heath Harris questioned Brimmer for the State. At the conclusion of Brimmer's voir dire, the State exercised the first of its fifteen statutorily granted peremptory strikes to remove her from jury service. *See* Art. 35.15(a). Defense counsel responded with a preemptive *Batson* challenge, noting Brimmer's race and gender, and that the State had used its first peremptory strike against a person of a minority race. Harris and two other members of the prosecution team who were present during Brimmer's voir dire Jason Hermus and Rachel Jones made a contemporaneous record of their race-neutral reasons for striking Brimmer.

[13]Judge Mark Stoltz presided over Appellant's trial. In addition to Judge Parker, Judges Joseph Clayton, Webb Biard, and Jim Fry assisted Judge Stoltz with individual voir dire.

Harris stated that he was concerned that Brimmer would demand that the State meet a higher standard of proof than the law required. Harris asserted that Brimmer's juror-questionnaire responses and individual voir dire testimony manifested Brimmer's belief that the death penalty had been applied disproportionately to African-Americans in Texas, generally, and in Dallas County, specifically. Harris also noted that, in her questionnaire responses, Brimmer had expressed a clear preference for life without the possibility of parole over a death sentence. Harris said that Brimmer's sentencing preference also manifested itself during her voir dire through Brimmer's reluctance to say that she could answer the special issues according to the evidence, if doing so would result in a death sentence:

> And when I asked her on numerous occasions, numerous time after time [sic] trying to get her to commit that if we prove [Appellant guilty of capital murder] and if Special Issue One was answered yes and Special Issue Two was answered no, if she could render a death sentence, she was very, very reluctant in answering. I almost at one point had to move on because I couldn't get her to say that she would do death over life.
>
> And I just think that it's clear from [Brimmer's voir dire] that there seemed to be a huge reluctance on her part to ever really consider a death sentence versus a life sentence without the possibility of parole, which is what she indicated not only on her questionnaire but also here today. And that's the primary reason I struck her.

Hermus stated that he and Jones concurred with Harris on all the reasons Harris had expressed to the court. Hermus then gave his additional reasons for striking Brimmer. Hermus stated that he had concerns with Brimmer before her individual voir dire, based on the equivocating nature of many of her juror-questionnaire answers, and he offered a

nonexhaustive list of examples: (1) Brimmer was not sure whether she favored the death penalty, (2) Brimmer wrote "none at this time" when asked to provide the best argument for the death penalty, and (3) Brimmer thought conviction of multiple murders was "possibly" a proper basis for death eligibility. Hermus asserted that Brimmer's live testimony often reflected a similar equivocation. He noted that Brimmer often rephrased Harris's questions into what she apparently wanted the question to be, rather than what Harris had asked.

Hermus stated that Brimmer's demeanor during the State's voir dire also troubled him. He observed Brimmer make faces at Harris or grimace on four different occasions when Harris tried to elicit her opinion on the death penalty and ability to impose it. Hermus believed that Brimmer's facial expressions and accompanying verbal responses indicated either displeasure with or disdain toward Harris. Alternatively, Hermus believed that Brimmer's expressions and responses reflected her reluctance to answer the special issues according to the evidence if a death sentence would result. Hermus also noted that Brimmer said that she had an issue with African-Americans being "railroaded" onto Death Row. Lastly, Hermus mentioned that Brimmer's "reluctance initially to [sic] circumstantial evidence" concerned the prosecution team.

Jones added that she was also troubled by Brimmer's hesitation and facial expression when Harris asked whether Brimmer could convict someone on the testimony of one witness, if the witness could testify to every element of the offense and Brimmer

believed the witness. Jones asserted that Brimmer's facial expression and response indicated disbelief that the State could obtain a conviction for capital murder based on the testimony of only one witness. Jones acknowledged that Brimmer qualified her initial response, but Jones asserted that Brimmer's qualification was also problematic because it suggested that Brimmer would require eyewitness testimony:

> [W]hen we talked to her about proving our case with one witness and if she believed that witness, she proceeded to go on -- she had some hesitation about that and, again, her facial expression, saying, how could you only have one witness?
>
> And then she qualified it by saying, oh, well, if that one witness saw him commit the crime, and managed to get out, before they too were stabbed, well, then okay, then I could do it.

Jones also cited Brimmer's responses when Harris discussed the State's burden of proof and tried to determine whether Brimmer would increase that burden. Jones asserted that Brimmer's answers were equivocal or uninformative, because Brimmer would essentially say no more than, "I just expect you to prove it. I would expect you to prove it." Jones also stated that towards the end of the State's voir dire, Brimmer expressed the sentiment that, in her heart, she did not believe in the death penalty.

After the prosecutors gave their reasons for striking Brimmer, defense counsel stated that he would reserve questions because the *Batson* challenge was premature at that stage of voir dire. Judge Parker agreed that the challenge was premature and denied it, stating that Appellant could reurge it at a later time.

A week later, venire member Parker's individual voir dire took place before Judge

Clayton. Harris questioned Parker for the State. At the conclusion of defense counsel's voir dire, prosecutor Jones challenged Parker for cause on two grounds. *See* Art. 35.16. First, Jones asserted that, although his answers on the issue vacillated somewhat, Parker's final answer during the State's voir dire was that the prosecution would have to prove its case to a degree that left no doubt in his mind. Jones argued that Parker was, therefore, requiring 100% proof from the State more than proof beyond a reasonable doubt which made him challengeable for cause under *Narvaiz v. State*, 840 S.W.2d 415, 427 (Tex. Crim. App. 1992). Second, Jones argued that Parker did not consider circumstantial evidence to be valid and could not return a guilty verdict based solely on circumstantial evidence. When these challenges for cause were unsuccessful, Hermus lodged two additional challenges for cause based on Parker's opposition to the death penalty as expressed in his juror questionnaire responses and voir dire testimony. Judge Clayton also denied the State's additional challenges for cause.

The next day, the State used its second peremptory strike to remove Parker from the venire. Hermus asked to place the State's reasons for the strike on the record, in case of a later *Batson* challenge. Hermus stated that the State struck Parker based on his questionnaire answers and voir dire testimony. Hermus particularly drew the court's attention to Parker's answers to the following questions:

- (Q. 1) Parker indicated that he was not in favor of the death penalty and wrote, "Only God should make that decision."
- (Q. 2) Parker indicated that he did not believe that the death penalty

should ever be imposed, but if the law provided for it, he could assess it under the proper circumstances.

- (Q. 4 5) Parker asserted that he had moral, religious, or personal beliefs that would prevent him from sitting in judgment of another human being or returning a verdict that would result in another's execution. In explanation, Parker wrote that "[t]he Bible tells us not to judge others" and returning a verdict that would result in a death sentence "mean[t] I [was] judging another and could cost them their life."

- (Q. 7) Parker wrote "none" when asked to provide the best argument for the death penalty.

- (Q. 8) Parker wrote that "God[']s word" was the best argument against the death penalty.

- (Q. 10) Parker disagreed with Texas law to the extent it makes multiple-murder a capital offense.

- (Q. 11) Parker disagreed that some crimes warrant the death penalty solely because of their severe facts and circumstances, regardless of whether the guilty person has committed prior violent acts. Parker wrote, "If you kill the[n] you are no better than they are."

- (Q. 12) Parker disagreed with Texas law to the extent it permits conviction of a crime, including capital murder, based solely on circumstantial evidence, with no eyewitnesses. Parker wrote, "That is not beyond a reasonable doubt to me."

- (Q. 14) Parker indicated that he did not believe in an eye for an eye, writing that "God said turn the other cheek."

- (Q. 18) Parker indicated that he did not believe that Texas applies the death penalty fairly. Parker wrote, "By statistic[s,] black men are given the death penalty more than whites, therefore I feel it is unfair."

- (Q. 20) When asked whether he believed the death penalty is used too often or too seldom, Parker wrote, "Too often, one is too many."

- (Q. 130) Parker indicated that he would not want to serve as a juror in Appellant's case, writing, "Because of the death penalty."

Hermus stated that Parker's responses to the foregoing questionnaire items reflected a strong bias against the death penalty, and Hermus did not believe that Parker could set it aside.

Based on Parker's questionnaire responses and voir dire testimony, Jones echoed Hermus's belief that, despite Parker's best efforts, he would not be able to overcome his scruples against the death penalty. Jones added that they were also concerned by the hesitation and reservations that Parker expressed about circumstantial evidence, as well as the burden of proof he would impose on the State,

> And then we asked him, [e]ven if you believe the circumstantial evidence, could you find somebody guilty, he vacillated on that. He said, [t]o me, circumstantial evidence is no proof that there's a case, and that he would always be concerned that it was somebody else that did it without an eyewitness. . . . [T]here could have been . . . other people involved that would lead to this person being innocent, and that he would want us to prove the case to him to where he would have no doubt in his mind, which is why the State submitted him for a challenge for cause on requiring 100 percent proof. He further said that circumstantial evidence, he considers that weak evidence.

Judge Clayton overruled Appellant's *Batson* challenge as to Parker, with leave to reurge the challenge later in voir dire.

When the *Batson* hearing occurred, about halfway through voir dire, the State had used a total of four strikes, exercising its third and fourth peremptory challenges to remove two white veniremembers, including Linda Schultz. Judge Stoltz presided over the *Batson*

hearing, assisted by Judge Clayton, who had conducted Parker's individual voir dire. Attempting to show that the State's race-neutral explanations for striking Brimmer and Parker were pretextual, defense counsel asserted that Brimmer, Parker, and a white venire member, John Nily, had each indicated on their questionnaires that they "had problems" with circumstantial evidence. Defense counsel asserted that the State had questioned Nily differently about the subject by giving him a more full explanation of what such evidence includes. Defense counsel examined prosecutors Harris (who had questioned Brimmer and Parker) and Jones (who had questioned Nily), asking them to explain the alleged disparity.

Harris testified that the general explanation of circumstantial evidence he gave to veniremembers varied, depending on different factors. Harris stated that the key difference between Brimmer, Parker, and Nily was that, although all three indicated on their questionnaires that they had problems with circumstantial evidence, Nily specifically indicated that he favored the death penalty. In contrast, Parker voiced strong opposition to the death penalty and Brimmer indicated uncertainty about the death penalty and a preference for life without the possibility of parole. Harris testified that the State's main concern with Parker was his very strong opposition to the death penalty. Harris said that Parker's attitudes toward circumstantial evidence also concerned the State but were secondary to Parker's stance on capital punishment. Harris testified that he tailored his questioning of Parker accordingly. Harris also testified that he explained to Parker that circumstantial evidence includes DNA and fingerprint evidence.

Harris testified that Brimmer's opposition to the death penalty was not as apparent from her questionnaire responses as Parker's, but it became clear during voir dire that she strongly favored life imprisonment without the possibility of parole over a death sentence. As to defense counsel's allegation that he did not explain the concept of circumstantial evidence to Brimmer, Harris noted that Brimmer was a trained paralegal and mediator who had worked for several law firms. Harris testified that Brimmer was not an average juror and gave no sign of needing the concept explained to her. Moreover, when Harris explained other aspects of death-penalty law, Brimmer's demeanor suggested that she felt insulted.

Harris testified that Brimmer's legal background and current employment also factored into the State's decision to strike her. Harris stated that the prosecution team subjected individuals with legal backgrounds to greater scrutiny due to concern that they would be more opinionated and likely to influence other jurors during deliberations. Harris asserted that Brimmer's job as an administrative officer for a Veteran's Hospital was problematic, because it potentially brought her into contact with people having mental-health complaints. Harris testified that similar concerns had caused the State to use its fourth peremptory strike against venire member Schultz, who was white and headed the special-education department for a local high school.

Defense counsel questioned Jones about her description, during Nily's voir dire, of circumstantial evidence as "almost a trick question." Jones denied that, by using the term

"trick question," she had meant that either party had designed questions to trick potential jurors. Jones explained that she used that phrase merely to reassure Nily. Jones stated that Nily had seemed a little intimidated by the process, based on his demeanor on the stand and statements that he had never been to court or involved in jury selection. When she asked him about circumstantial evidence, Jones explained:

> [Nily] seemed maybe ashamed . . . when I said, do you know that circumstantial evidence includes things like DNA and fingerprints? [T]he record can't fully reflect it, but he did one of these like no, just kind of backing away, looking around at everybody.
>
> And, so, I wanted to reassure him that there was nothing wrong with it, that it is somewhat of a trick question, and I think -- We don't explain that DNA and fingerprints are circumstantial evidence. Most people don't think about it in those terms, and that was exactly how it was with him.

Defense counsel asked Jones why the State did not provide the same explanation to Brimmer and Parker. Jones responded that Harris had given Parker substantially the same explanation and that Brimmer did not seem to need an explanation. Jones further testified that the State's main concern during voir dire was always the venire member's attitudes about capital punishment. Jones asserted that Brimmer and Parker held fundamentally different views from Nily. Jones explained that Brimmer said that she would keep the death penalty if she were governor of Texas, but also stated that, in her heart of hearts, she believed in life imprisonment without the possibility of parole rather than death. Jones stated that Parker did not believe in the death penalty, but asserted that he was willing to perform his civic duty, even at the risk of violating his conscience. Jones asserted that

Nily, in contrast, testified that he had always believed in the death penalty and would expand death eligibility to rapists and repeat child abusers.

At the conclusion of the hearing, Judge Stoltz stated that he had reviewed the transcripts of Brimmer's, Parker's, and Nily's individual voir dire. He denied Appellant's *Batson* challenges to Brimmer and Parker, finding that the State's facially race-neutral reasons for striking them Brimmer and Parker were genuine and reasonable.

After twelve jurors had been seated, the defense reurged its *Batson* challenges to Judge Stoltz. Defense counsel asserted that, before the *Batson* hearing, the prosecution team had questioned African-American veniremembers differently than they had questioned other potential jurors. Counsel argued that, following the *Batson* hearing, the prosecutors began to question African-American veniremembers in a way that was more consistent with how they questioned other jurors. Counsel averred that the alleged change supported the defense's argument that race motivated the State's strikes against Brimmer and Parker. Defense counsel noted that, following the *Batson* hearing, the parties had accepted James Brown, an African-American male, as a juror. Counsel offered the transcript of Brown's individual voir dire as an exhibit to support his reurged *Batson* challenges.

Jones, who had questioned Brown for the State, responded that the State's questioning during individual voir dire was

> a fluid proposition . . . based on the questionnaire. It depends on how the juror answers the questions, it depends on the style of the prosecutor who is

> doing that individual questioning. So yes, some of the questions may change, some may be more in-depth depending on what answer the juror gives, and certainly, as we pointed out before, it all starts with how and whether or not that person believes in the death penalty.
>
> Mr. Brown has always believed in the death penalty, he talked about that in his questionnaire, talked about that in individual voir dire.
>
> Mr. Parker on his questionnaire said he did not believe in the death penalty and never has, thereby marking a three [on Question 2]. [Brimmer] marked a two on [Question 2 of] her questionnaire. However, one of the first things she said in voir dire [was] that she did not favor the death penalty or believe in it.

Jones asserted "absolutely" that any change in the State's questioning was due to the way the veniremembers answered the questionnaire, rather than the color of their skin. Jones also noted that, besides accepting Brown as a juror, the State also accepted Betty Pettway, Rosetta Johnlouis, and Diane Tyler, all of whom were African-American. Jones stated that Pettway was seated as juror, while the defense used peremptory challenges against Johnlouis and Tyler. After reviewing Brown's questionnaire and the transcript of his individual voir dire, Judge Stoltz again denied Appellant's *Batson* challenges.

After reviewing the entire record of voir dire, we conclude that Appellant is not entitled to relief. Initially, we note that the State exercised only seven of its fifteen available peremptory strikes, using only two of those seven against African-American jurors. It used the other five against white veniremembers. The State also accepted four African-American veniremembers as jurors, and ultimately two of those individuals served on Appellant's jury. Further, the record amply supports the race-neutral explanations that

the prosecution team offered at the time of the strikes, the *Batson* hearing, and when Appellant reurged his *Batson* challenges after twelve jurors had been seated. *See Jasper v. State*, 61 S.W.3d 413, 422 (Tex. Crim. App. 2001) (stating that valid and neutral reasons for exercising a peremptory challenge include a veniremember's vacillation regarding his capacity to impose the death penalty despite personal beliefs, and numerous answers in a veniremember's questionnaire indicating a bias against the imposition of the death penalty).

After viewing the evidence in the light most favorable to the trial court's ruling, we conclude that the trial court's denial of Appellant's *Batson* challenges was not clearly erroneous. *Young*, 283 S.W.3d at 866. Points of error fifteen and sixteen are overruled.

VII. VOIR DIRE—DENIALS OF CHALLENGES FOR CAUSE

In points of error eighteen through thirty-four, Appellant alleges that the trial court erred in denying his challenges for cause to seventeen veniremembers: Jimmy Lumpkins, Bevin Koshy, Chad Newton, Andrew Askins, Veronica Hernandez, Jana Morgan, Pieter Kessels,[14] Jennifer Hilburn, Charles Sturgeon, Rosetta Johnlouis, Diana Tyler,[15] Tiffany Langdon, Camille Sowden, Karen Evans, Patti Matthews, Gaylord O'Con, and Kenneth Adair. The record shows that Appellant exhausted his fifteen peremptory strikes, using

[14]In point of error twenty-four, Appellant names "Peter Kessels" as the venire member at issue. In the record, Kessels's first name appears as "Pieter."

[15]In point of error twenty-eight, Appellant names "Diane Taylor" as the juror against whom he raised a challenge for cause. We understand him to refer to venire member Diana Tyler.

fourteen of them to remove Lumpkins, Koshy, Newton, Askins, Hernandez, Morgan, Kessels, Hilburn, Sturgeon, Johnlouis, Tyler, Langdon, Sowden, and Evans after the trial court denied his cause-based challenges to them.[16] After Evans's dismissal, Appellant received and used two additional peremptory strikes to remove Matthews and O'Con after unsuccessfully challenging them for cause. The trial court denied Appellant's challenge for cause to Adair, as well as Appellant's request for a third additional strike. Appellant asserted that, as a result of the trial court's refusal to grant an eighteenth peremptory strike, he had been forced to accept an objectionable juror, Adair.[17] Because Appellant received two additional peremptory strikes, he can only demonstrate harm by showing that the trial court erroneously denied at least three of his challenges for cause. *Comeaux v. State*, 445 S.W.3d 745, 749 (Tex. Crim. App. 2014); *Chambers v. State*, 866 S.W.2d 9, 22 23 (Tex. Crim. App. 1993).

A defendant may challenge a venire member for cause if the member is biased or prejudiced against the defendant or the law on which the State or defendant is entitled to rely. *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009); *see* Art. 35.16(a)(9), (c)(2). A trial court must excuse the prospective juror if bias or prejudice would substantially impair the juror's ability to carry out his oath and instructions in accordance with the law. *Feldman*, 71 S.W.3d at 744. But before the judge excuses a potential juror

---

[16]Appellant exercised his eighth peremptory strike against venire member Can Icduygu. Appellant did not challenge Icduygu for cause.

[17]The record shows that Adair became the twelfth member of Appellant's petit jury.

for cause, the law must be explained to the juror. *Gardner*, 306 S.W.3d at 295. The proponent of the challenge for cause bears the burden of establishing that the challenge is proper. *Id.* The proponent does not meet this burden until he has shown that the venire member understood the requirements of the law and could not overcome his prejudice well enough to follow the law. *Id.*

When reviewing a trial court's decision to deny a challenge for cause, we look to the entire record to determine whether sufficient evidence exists to support the court's ruling and reverse only for a clear abuse of discretion. *Davis*, 329 S.W.3d at 807. Because the trial judge is in the best position to evaluate a potential juror's demeanor and responses, we review a trial court's ruling on a challenge for cause with considerable deference. *Gardner*, 306 S.W.3d at 295; *see Burks v. State*, 876 S.W.2d 877, 893 (Tex. Crim. App. 1994) (stating that the trial judge is in the best position to determine whether a potential juror will set aside his views and honestly and truthfully follow the juror's oath). When a prospective juror's answers concerning his ability to follow the law are vacillating, equivocating, ambiguous, unclear, or contradictory, we accord particular deference to the trial court's decision. *Gardner*, 306 S.W.3d at 295; *Moore v. State*, 999 S.W.2d 385, 400, 407 (Tex. Crim. App. 1999).

A. Lumpkins

When defense counsel asked Lumpkins to explain his feelings about the insanity defense, he answered: "I think -- I think it would have to be very strong, compelling

evidence, but it's not something I reject out of hand." Defense counsel argued that this statement showed that Lumpkins would require Appellant to prove insanity by a compelling-evidence standard, rather than a preponderance. *See* TEX. PENAL CODE § 8.01(a).

The trial court did not abuse its discretion in denying Appellant's challenge for cause on this basis. Lumpkins's statement did not necessarily indicate that he would require Appellant to prove insanity by more than a preponderance standard. Further, the remainder of the exchange between Lumpkins and defense counsel suggested that Lumpkins did not see "compelling" evidence as something that was inconsistent with a preponderance-of-the-evidence standard. After Lumpkins used the phrase "compelling evidence" and stated that he would not automatically reject an insanity defense, defense counsel continued to question him as follows:

> [DEFENSE]: Yes. We just can't -- We can't be flippant about it. As you've indicated in your answers before, I assume you mean that, you know, you want something of substance.
>
> [LUMPKINS]: Yeah, it can't be because that's the only recourse.
>
> [DEFENSE]: Right. Okay. And I think society, especially as recognized in this state and other states, as a society, we don't want to punish people who do not know, because of some mental disease or defect, that they don't know the difference between right and wrong. Is that a fair statement?
>
> [LUMPKINS]: Uh-huh.
>
> [DEFENSE]: Okay. And in that same vein, can you see that there are some circumstances in which people actually physically go through acts that cause people to die, or cause things to happen that are criminal offenses,

> and that they don't know what they are doing because of some mental disease or defect?
>
> [LUMPKINS]: I agree it's possible.
>
> [DEFENSE]: It's possible. Okay. And that we have to sometimes look at all the circumstances surrounding an event and possibly rely on other people who study, make a profession of studying the mind; is that a fair statement?
>
> [LUMPKINS]: It's why I said it's compelling.

In addition, during earlier questioning by the State, Lumpkins evinced his understanding of Appellant's burden of proof regarding the insanity defense and unequivocally stated that he would apply it if selected to serve. After informing Lumpkins that Appellant might assert an insanity defense, the prosecutor discussed the concept of legal insanity and explained Appellant's preponderance burden of proof. The prosecutor then probed Lumpkins's ability to follow the law, if Appellant raised an insanity defense:

> [PROSECUTION]: [I]f [insanity] were the defense, could you really use your best judgment in determining whether or not the insanity is bona fide or bunk?
>
> [LUMPKINS]: Well, that would depend on the preponderance of the evidence to support it.
>
> [PROSECUTION]: Sure.
>
> [LUMPKINS]: In that event, yes.

After discussing other topics related to the insanity determination, the prosecutor returned to Appellant's preponderance burden of proof:

> [PROSECUTION]: If you find the defendant not guilty, he goes home. Okay? And when I talked to you earlier about insanity, the way insanity

> works is that, if you do believe [by] a preponderance of the evidence [that] the defendant did not know that what he was doing was wrong at the time of the commission of the offense, you have to find him not guilty by reason of insanity. That's what your oath is going to require you to do. If you believe that, will you do it?
>
> [LUMPKINS]: Yes.

Lumpkins's entire voir dire contains sufficient evidence to support the trial court's ruling. *Davis*, 329 S.W.3d at 807. Thus, Appellant has not demonstrated that the trial court erred in overruling his challenge for cause to Lumpkins. Point of error eighteen is overruled.

B. Askins

Defense counsel argued that Askins would require a higher burden of proof than the law required on the issue of insanity. The record of his individual voir dire shows that Askins vacillated about his ability to apply the preponderance standard, should Appellant have raised an insanity defense.

When questioned by the State, Askins asserted that he could find Appellant not guilty by reason of insanity if Appellant raised that defense at trial and proved it by a preponderance of the evidence. When defense counsel asked Askins whether he had any problems with the idea of an insanity defense, the venire member retreated from his original position:

> [ASKINS]: You know, it's hard for me to consider. I mean obviously there are always circumstances that can bring that into play. But, honestly, it is hard for me to consider the insanity defense, so I mean.

> [DEFENSE]: Would you, since our burden of proof is not to the level of beyond a reasonable doubt on insanity, it's by a preponderance which is just kind of like more likely than not, like a -- If you're using percentages, it would be like 50.001 percent that we have to get to. Would you require the defense to have a higher burden of proof in the insanity issue because it would be so hard for you to consider?
>
> [ASKINS]: Yeah.
>
> [DEFENSE]: You would?
>
> [ASKINS]: Yeah, I would.

Defense counsel then requested a recess and challenged Askins for cause. The trial court denied the challenge and after recalling Askins to the stand, addressed him directly:

> [COURT]: Mr. Askins, the burden on the defense on the issue of insanity, it's their burden, it's by a preponderance of the evidence. The legal definition of preponderance of the evidence is the greater weight of the credible and believable evidence. That's their burden.
>
> [ASKINS]: Okay.
>
> [COURT]: Can you accept that burden?
>
> [ASKINS]: Yes.
>
> [COURT]: Okay. Would you apply that burden --
>
> [ASKINS]: Yes.
>
> [COURT]: -- in answering the issue on insanity?
>
> [ASKINS]: Yes.

After the trial court asked Askins to step outside, defense counsel renewed the challenge. The trial court again denied it.

The trial court did not abuse its discretion. To the extent Askins vacillated about his ability to apply a preponderance standard to Appellant's insanity defense, the trial judge was in the best position to determine whether the venire member would set aside his views and honestly and truthfully follow the juror's oath. *Burks*, 876 S.W.2d at 893. In his final statement on the issue, Askins asserted that he could, and would, follow the law. The trial judge was entitled to believe him, and we defer to that belief. *See Gonzales v. State*, 353 S.W.3d 826, 836 n.7 (Tex. Crim. App. 2011). Point of error twenty-one is overruled.

C. Hernandez

Defense counsel argued that Hernandez could not follow the law regarding the insanity defense and would elevate the defense's burden of proof. The record shows that, under questioning by the State, Hernandez unequivocally stated that she could and would apply the preponderance standard if Appellant raised an insanity defense and would acquit him if he satisfied that standard. When questioned by defense counsel, Hernandez again agreed that Appellant's burden of proof regarding the insanity issue was a preponderance standard. However, in response to a follow-up question, Hernandez manifested some confusion about the possible evidentiary burdens and the differences between them:

> [DEFENSE]: Well, let me ask it to you this way. Is [preponderance] going to be the same burden as like clear and convincing evidence or by proof beyond a reasonable doubt to you?
>
> [HERNANDEZ]: Beyond a reasonable doubt.
>
> [DEFENSE]: Well, you shook your head and you said proof beyond a reasonable doubt, so I didn't understand what that meant to you.

[HERNANDEZ]: It's beyond a reasonable doubt.

[DEFENSE]: Okay. So you're saying that a preponderance of the evidence is going to have to be proven to you beyond a reasonable doubt?

[HERNANDEZ]: Yes.

Defense counsel clarified that preponderance of the evidence was an evidentiary standard of its own and explained where it stood in relation to the clear-and-convincing and reasonable-doubt evidentiary burdens. After stating that the law required Appellant to prove insanity by a preponderance of the evidence, counsel returned to his original question:

[DEFENSE]: [O]kay, would you be able to hold us to that burden, or do you think it's going to take more like clear and convincing evidence or proof beyond a reasonable doubt?

[HERNANDEZ]: I could hold you to that burden.

[DEFENSE]: You could -- I'm sorry?

[HERNANDEZ]: I could do that by a preponderance.

Defense counsel then asked Hernandez for her thoughts on psychiatrists and psychologists. When Hernandez responded, "There needs to be more like evidence from different doctors," this exchange followed:

[DEFENSE]: Okay. So if we were to bring you one doctor and you believed him, by a preponderance of the evidence, that our client was insane at the time of the offense, is that going to be sufficient for you, or are you going to need more than that?

[HERNANDEZ]: I think I'll need more than that.

[DEFENSE]: So you're going to -- And this is where we have to use the terms biased and prejudiced.

[HERNANDEZ]: That's fine.

[DEFENSE]: To some degree, you're going to have a bias against the defense because you're going to require, even if you believe that one doctor by a preponderance of the evidence, you're going to require more than that; is that correct?

[HERNANDEZ]: Yes, just to be on the safe side.

[DEFENSE]: And that was a yes; is that correct?

[HERNANDEZ]: Yes, sir.

[DEFENSE]: Okay. And as I've explained to you, you know, I've told you in that situation you believe that expert, okay, and you believe him and you believe that we've proven our case by a preponderance of the evidence.

But what you're telling me is, even though you believe that, and you believe it by a preponderance of the evidence, you're going to require more, correct?

[HERNANDEZ]: He needs to gain my -- I need to be able to, you know, I need to be able to trust him. You know, I need to see like what kind of history that doctor has and all that.

[DEFENSE]: Okay. Well, I'm telling you, okay, I'm telling you right now that you believe him. Okay? And you believe him --

[HERNANDEZ]: So you're telling me that I believe him.

[DEFENSE]: Yeah, and I'm saying --

[HERNANDEZ]: would say I believe him.

Evidently uncertain whether Hernandez understood the hypothetical or dissatisfied with her answer, defense counsel re-emphasized the assumptions he was asking Hernandez

to make, then continued,

> [DEFENSE]: And you've indicated to me that, in that situation, you're going to require more than one doctor. Is that still --
>
> [HERNANDEZ]: Yes. If it's possible, yes. But I mean if he already gained my trust and has more -- the balance is more on this side, like it's better.
>
> [DEFENSE]: Let me just -- The trust and everything, that's something that's personal to you. Okay.
>
> [HERNANDEZ]: Okay.
>
> [DEFENSE]: All I can tell you is what the law says. And I'm now trying to put you in a situation where, under the law, we've proven to you by a preponderance of the evidence --
>
> [HERNANDEZ]: Yes.
>
> [DEFENSE]: -- that he has proven that he was insane by the preponderance of the evidence. Just that burden, okay?
>
> [HERNANDEZ]: Okay.
>
> [DEFENSE]: And what you have indicated to me is that, given that situation, you would have a bias against --
>
> [HERNANDEZ]: Well, if it's by law, then I need to follow the law.

After observing that it was everyone's natural tendency to say that she could follow the law, counsel posed the hypothetical to Hernandez again and asked what her verdict would be. Hernandez responded that, "I always go with whatever the law says." Counsel continued to press Hernandez:

> [DEFENSE]: So you understand what I'm getting at here, okay?
>
> [HERNANDEZ]: Uh-huh.

> [DEFENSE]: I'm telling you that we've proven to you by the preponderance of the evidence --
>
> [HERNANDEZ]: You've already proven it to me.
>
> [DEFENSE]: And I want to know, what would your verdict be in that situation?

When the prosecutor objected that the question had already been asked and answered, the trial court stated, "He can ask it again. He can ask it for three more minutes. I've heard -- I've heard what she said." When defense counsel asked Hernandez for her answer, she stated, "If it's already been proven, then yes, I'll go with that." Defense counsel concluded his voir dire and immediately afterward challenged her for cause. The trial court denied the challenge.

The trial court did not abuse its discretion. Hernandez repeatedly stated that she would hold Appellant to a preponderance standard regarding his insanity defense. To the extent that Hernandez's answers sometimes suggested she would hold Appellant to a higher burden, the record supports a finding that those responses were based on her temporary misapprehension of the law or confusion over defense counsel's hypotheticals. Further, the trial judge was in the best position to evaluate Hernandez's demeanor and responses. *See Davis*, 329 S.W.3d at 807. We extend particular deference to the trial judge's decision in these circumstances. *See id.* Point of error twenty-two is overruled.

D. Morgan, Hilburn, Langdon, and O'Con

Defense counsel challenged Morgan, Hilburn, Langdon, and O'Con solely due to

certain written responses they gave on the juror questionnaire, arguing that the answers showed that these veniremembers would automatically vote for the death penalty. The trial court did not abuse its discretion in overruling Appellant's challenges for cause to these four prospective jurors.

While a juror who would automatically vote for the death penalty can be challengeable for cause once a proper basis is established, Appellant failed to establish the proper bases to challenge these veniremembers for cause. To establish those bases, Appellant had to show that "the veniremember[s] understood the requirements of the law and could not overcome [their] prejudice well enough to follow the law." *Gardner*, 306 S.W.3d at 295. The requirements of the law are explained during voir dire[18] and after the questionnaire or juror card is answered.[19] As a result, a veniremember cannot be sufficiently questioned regarding possible prejudice revealed in the questionnaire or during voir dire without, at least, some minimum amount of interaction on the part of the veniremember during voir dire.

---

[18]*See, e.g.*, *Cardenas v. State*, 325 S.W.3d 179, 185 86 (Tex. Crim. App. 2010) (stating that the trial judge, prosecutor, and defense attorney explained the requirements of the law applicable to the case to the venire panel during voir dire); *Barnard v. State*, 730 S.W.2d 703, 715 (Tex. Crim. App. 1987) (holding that the trial judge did not err by conducting a general voir dire before individual voir dire in a capital case because the defendant was allowed to individually voir dire veniremembers regarding the law of capital murder); *Martinez v. State*, 867 S.W.2d 30, 35 (Tex. Crim. App. 1993) (same).

[19]*See, e.g.*, *Garza v. State*, 7 S.W.3d 164, 166 (Tex. Crim. App. 1999) (noting that written questionnaires are not a formal part of voir dire proceedings and, in some cases, questionnaires or juror information cards can be submitted "long in advance of voir dire").

Therefore, because Appellant solely relied on their questionnaire answers in challenging Morgan, Hilburn, Langdon, and O'Con for cause, he could not have established proper bases for challenging these veniremembers, and it was within the trial court's discretion to determine that Appellant did not satisfy his burden to show that the challenges were proper. *See Garza*, 7 S.W.3d 164, 166 (Tex. Crim. App. 1999). Points of error twenty-three, twenty-five, twenty-nine, and thirty-three are overruled.

E. Kessels

Defense counsel argued that Kessels would automatically impose the death penalty if Appellant were convicted of capital murder. At trial, counsel alluded to a portion of Kessels's voir dire testimony, in which counsel paraphrased Kessels as "say[ing] something about that he would start out at a death penalty and that it would take a lot of thinking for him to get back to neutral." The trial court denied Appellant's challenge.

In support of his argument, Appellant directs us to a portion of Kessels's voir dire by the State. The prosecutor had begun to discuss the future-dangerousness special issue. He had explained that it was permissible for a juror to answer the future dangerousness issue "yes" based on the circumstances of the offense, if the juror believed that the circumstances so warranted. However, the prosecutor had also emphasized that the juror's answer to the future dangerousness issue could not be automatic. Although Kessels answered "yes" when the prosecutor asked whether he could follow the process, the prosecutor noted hesitation in Kessels's response. Noting the unfamiliarity of the special

issues to most jurors, the prosecutor asked Kessels to explain. Kessels responded:

> [KESSELS]: When you said that I have to not really be able to answer question -- Special Issue 1 until you've had the burden of proving it.
>
> [PROSECUTOR]: Okay.
>
> [KESSELS]: I really just have a general belief that if someone commits, what you're saying, a multiple murder, a multiple stabbing murder, that there inherently may be something in them that's going to make me answer that yes.
>
> [PROSECUTOR]: Okay.
>
> [KESSELS]: So that might be something that I would have to work on to get a more neutral playing field before that started.

Appellant based his challenge on these statements.

The trial court did not abuse its discretion in denying Appellant's challenge for cause to Kessels. The record shows that Kessels made the complained-of statements before the law was fully explained to him. Following Kessels's statements, the prosecutor again noted jurors' general unfamiliarity with capital-sentencing procedures and explained the second special issue. The prosecutor then presented a hypothetical to help Kessels understand the special issues' interaction and why jurors should not automatically answer them a certain way, even when a capital-murder conviction involved multiple murders. The prosecutor began by describing the bare facts of a hypothetical capital murder involving two victims facts from which, without additional information, a jury might reasonably draw negative inferences concerning the special issues (i.e., that the death penalty should be assessed).

But the prosecutor then gave Kessels various examples of evidence that might be presented only at the punishment phase and that might lead jurors to answer the special issues in a way that would result in a life sentence without the possibility of parole. Afterward, the prosecutor questioned Kessels as follows:

> [PROSECUTOR]: And can you see how not having heard all the evidence [yet], the answer has to start out no on Special Issue 1 until we prove it otherwise and until you've kept an open mind and heard all the evidence?
>
> Does that make sense?
>
> [KESSELS]: It does.
>
> [PROSECUTOR]: Okay. Does that clear up your hesitation?
>
> [KESSELS]: Yes. Great explanation.

Kessels subsequently asserted that the procedure and rationale surrounding the special issues made sense to him, and that he had no hesitation about being able to participate in the process and keep an open mind until he heard all the evidence.

The record contains sufficient evidence to support the trial court's ruling. *Davis*, 329 S.W.3d at 807. Point of error twenty-four is overruled.

F. Sturgeon

Appellant asserts that Sturgeon was challengeable for cause because he exhibited a lack of candor in his written response to a questionnaire item concerning prior jury service. Appellant relies on *Franklin v. State*, 138 S.W.3d 351, 354 55 (Tex. Crim. App. 2004), asserting that when a potential juror withholds material information, it suggests bias.

Question 45 of the juror questionnaire asked veniremembers whether they, or their spouses, had ever been jurors in a civil or criminal case. If the venire member checked "yes," the question directed the individual to provide the year and type of case, verdict, punishment amount, and whether the judge or the jury set punishment. Sturgeon checked "yes." He wrote that, while he could not recall the year, he had been a juror in a criminal case in which the jury had acquitted the defendant.

During the State's voir dire, the prosecutor asked Sturgeon about his jury service in the case Sturgeon had listed in response to Question 45. Sturgeon described it as a pedophilia case and stated that the trial lasted three or four days. When the prosecutor asked whether that was his first time serving on a jury, Sturgeon answered, "Something like that. I mean, I served on a traffic violation jury in Garland." Sturgeon subsequently told the prosecutor that his service on the traffic violation case occurred "way before" his service on the pedophilia case. When the defense questioned him, Sturgeon guessed that he might have served on the pedophilia case in the late 1990s.

In challenging him for cause, defense counsel acknowledged that Sturgeon had listed his jury service in the pedophilia case on the questionnaire, but noted that Sturgeon had not included his service in the traffic case. Counsel argued that Sturgeon's failure to list his traffic-case service on the questionnaire reflected a lack of candor and suggested that he would automatically vote for the death penalty.

Appellant's reliance on *Franklin* is misplaced. *Franklin* concerned the standard of

harm an appellate court should apply when a trial judge erroneously denies a mistrial that the defendant sought on the grounds that a juror withheld material information during voir dire. *Id.* at 355. In that context, we noted our previous holding that, "where a juror withholds material information during the voir dire process," the Sixth Amendment is implicated because "the parties are denied the opportunity to exercise their challenges, thus hampering their selection of a disinterested and impartial jury." *Id.* at 354 (citing *Salazar v. State*, 562 S.W.2d 480, 482 (Tex. Crim. App. [Panel Op.] 1978)).

Sturgeon did not withhold the information about his traffic-case jury service. In fact, Sturgeon volunteered the information during his individual voir dire. Both parties had an opportunity to question Sturgeon on the matter and make informed choices concerning the exercise of their challenges. In addition, it was within the trial judge's discretion to determine that the information was immaterial. *See Franklin v. State*, 12 S.W.3d 473, 477 79 (Tex. Crim. App. 2000).

The record contains sufficient evidence to support the trial court's ruling. The trial court did not abuse its discretion in denying Appellant's challenge for cause to Sturgeon based on his alleged lack of candor on the juror questionnaire. Point of error twenty-six is overruled.

G. Johnlouis

Defense counsel argued that Johnlouis's response to his hypothetical showed that she would automatically assess the death penalty. Counsel also asserted that Johnlouis

would elevate Appellant's burden of proof regarding the insanity determination because she would require him to present an expert in support of an insanity defense. We find no abuse of discretion because the record of Johnlouis's voir dire supports the trial court's ruling.

During the State's voir dire, the prosecutor explained that Texas law provides two sentencing options for capital murder: (1) life without parole or (2) death. Johnlouis agreed that she believed the death penalty was appropriate "in certain circumstances" but was open to both sentencing options. After exploring topics primarily relevant to the guilt-innocence determination, the prosecutor returned to the subject of punishment and Johnlouis's ability to answer the special issues based on the law and evidence, even if it meant that a death sentence would result. Johnlouis stated that she would be comfortable participating in a process that could result in a defendant receiving a death sentence, but Johnlouis repeatedly emphasized that her answers to the special issues would depend on the evidence. Johnlouis also asserted that her answers to the special issues would not be dictated by the fact that the jury had found Appellant guilty of capital murder.

During Appellant's voir dire, defense counsel presented Johnlouis with a hypothetical, asking her to assume that she sat on a jury that had just found a defendant guilty of capital murder. Counsel emphasized that by finding the defendant guilty, the jury had necessarily determined that the defendant had "[k]nowingly and intentionally caused the death of two people. All right. Meant to do it, intended to do it. It wasn't a mistake. It

wasn't an accident. The person wasn't insane, okay?" Following that introduction, defense counsel asked Johnlouis to tell him "what [her] thoughts are on the death penalty at that point." Johnlouis responded, "Again, I have to hear --" before being cut off by the prosecutor, who objected that defense counsel had asked an improper commitment question. After the court overruled the objection and defense counsel asked for Johnlouis's answer, she asked him to "[g]ive [her] the question . . . again. There's so much going on." Counsel repeated the hypothetical, again emphasizing what the jury had necessarily determined by finding the defendant guilty and asking for Johnlouis's "thoughts . . . on the death penalty at that point." Johnlouis answered, "The death penalty because he did it, you know, and there was no -- he did it."

Apparently believing that Johnlouis did not understand the issue or his question, defense counsel explained the differences in the jury's inquiry at the guilt-innocence phase versus the punishment phase of trial, focusing on the special issues. He then presented the hypothetical again:

> [DEFENSE]: And what were your thoughts on the death penalty at that point?
>
> [JOHNLOUIS]: And Special [Issue] Number 1 has been --
>
> [DEFENSE]: No, I'm just saying -- that's what I'm saying, you're just at the guilt/innocence portion, okay?
>
> [JOHNLOUIS]: I'm just at the guilt/innocence?
>
> [DEFENSE]: Yeah, you found the person guilty of capital murder.

[JOHNLOUIS]: Guilty? Okay.

[DEFENSE]: Okay. So what would your thoughts be on the death penalty at that point?

[JOHNLOUIS]: Again, if they -- if he's guilty or she's guilty, then if they're imposing the death penalty, then they'll impose the death penalty, I guess.

[DEFENSE]: So your belief is that at that phase of the trial the person ought to get the death penalty, is that your position?

[JOHNLOUIS]: Yeah. Yeah.

Defense counsel then abandoned his hypothetical and proceeded to discuss Special Issue Number 1:

[DEFENSE]: Okay. And so when you're going through that special issue, would you agree with me that you would have to be convinced beyond a reasonable doubt that this defendant would commit criminal acts of violence that would constitute a continuing threat to society, correct?

Would you agree with me on that?

[JOHNLOUIS]: Again, I need to hear, you know, more than just he's -- you know, what he did. I mean what happened, you know, the circumstances of what happened.

Johnlouis continued:

[JOHNLOUIS]: I don't think I would say that he would be a threat until I can understand or hear, you know, some of the things that's happening that he did or whatever. I -- I can't make that decision at this point.

[DEFENSE]: And I'm not asking you to make the decision. What I'm trying to --

[JOHNLOUIS]: Would he be a threat? Until I get the evidence, I'm not sure, you know. I have to weigh what's going on with him, you know. I

> don't -- and then try to put that into perspective. I'm not sure if he would be a threat to society. I don't, you know --
>
> [DEFENSE]: And that's what I'm getting at.
>
> [JOHNLOUIS]: Yeah.

The record supports a finding that Johnlouis was confused by counsel's hypothetical, which asked for her "thoughts" on the death penalty rather than whether she could follow the law, and that her answers resulted from that confusion. Johnlouis's subsequent statements regarding Special Issue Number 1, and her testimony during the State's voir dire, manifested her understanding that, by law, a death sentence cannot be the automatic consequence of a capital-murder conviction. They similarly manifested her willingness to follow the law. In any event, the trial judge was in the best position to determine whether Johnlouis would set aside her personal views and honestly and truthfully follow the juror's oath. *Burks*, 876 S.W.2d at 893. We defer to his determination.

We next consider Appellant's assertion that Johnlouis would elevate his burden of proof by requiring him to present an expert witness to support his insanity defense. When defense counsel initially began discussing the insanity defense and the applicable burden of proof, he explained that the law did not require Appellant to present expert testimony, and that Appellant could prove his defense solely with lay testimony. Johnlouis stated that she could find Appellant not guilty by reason of insanity based on the testimony of one psychologist, if she believed the testimony and it established legal insanity by a

preponderance of the evidence. Johnlouis also stated that she could find Appellant not guilty by reason of insanity by a preponderance of the evidence, based on a lay witness's testimony and without expert testimony. But when defense counsel began to transition to another topic, Johnlouis asked for clarification regarding the means by which Appellant could prove legal insanity. Defense counsel explained again that Appellant could prove his defense only with lay testimony, if he wished. Afterward, Johnlouis stated that she understood and had no problem with a lack of expert testimony.

Defense counsel later asked Johnlouis if she had any questions. Johnlouis expressed some difficulty with the idea of Appellant proving insanity solely through lay testimony: "I don't quite agree -- I mean, understand, maybe. I don't agree with the non-expert delivery. That's a problem with me, yeah." She continued,

> [JOHNLOUIS]: You know, I -- personally, I feel that you have to have somebody -- I mean, a cousin or somebody --
>
> [DEFENSE]: Okay.
>
> [JOHNLOUIS]: -- saying that they're insane or whatever.
>
> [DEFENSE]: So you're saying that you would need an expert there?
>
> [JOHNLOUIS]: I think I would probably want one, you know, just to, you know, and run tests or whatever on the --
>
> [DEFENSE]: And -- and --
>
> [JOHNLOUIS]: Yeah, because, you know, you can't just have me --
>
> [DEFENSE]: And that's

[JOHNLOUIS]: -- come up and say I'm crazy when I'm not.

Defense counsel explained the law again and referred to Johnlouis's earlier assertion that she could find Appellant not guilty by reason of insanity if he proved it by a preponderance of the evidence through a lay witness. Counsel told Johnlouis that if her answer had changed, then she needed to tell him. Johnlouis responded, "[I]f that's what the law says, then we have to follow the law, you know, so that's why I said I could do it. But just because the law -- not that I agree with it, but because of the law." When counsel continued to press her on the point, Johnlouis stated, "Well, I -- I just said -- I don't -- I personally don't agree with that but, you know, if that's the law, that's the law, you know." In further discussion, Johnlouis was emphatic about her ability to set aside her personal disagreement and follow the law, now that she understood it.

To the extent that Johnlouis gave inconsistent or unclear statements, the trial court was in the best position to determine whether she would set aside her personal views and honestly and truthfully follow the juror's oath. *Id.* We defer to its determination. Point of error twenty-seven is overruled.

H. Tyler

Appellant argues that Tyler was challengeable because (1) she would require an expert to testify in support of an insanity defense, and (2) she would impose a higher burden of proof than the law required regarding the insanity determination. The trial court did not abuse its discretion in overruling Appellant's challenge for cause on these bases.

During the State's voir dire, the prosecutor informed Tyler that Appellant might raise an insanity defense at trial. The prosecutor explained the definition of legal insanity, Appellant's preponderance burden of proof, and that Appellant need not present expert testimony or a certain number of witnesses. Tyler unequivocally stated that she could follow the law in deciding whether Appellant was not guilty by reason of insanity.

The exchange that formed the basis of Appellant's challenge to Tyler came at the end of the defense's voir dire when defense counsel directed Tyler's attention to Question 38 of the juror questionnaire. Question 38 informed potential jurors that a person with mental illness can receive life without parole or the death penalty for capital murder and asked veniremembers what they thought. Tyler had written, "I don't know about that[,] sometime[s] I think they [know] what they are doing." When defense counsel asked Tyler what she meant by her answer, she explained,

> [TYLER]: Sometimes people are mentally ill but they -- sometimes they be in their right mind and I think sometimes they know what they be doing, and then sometimes if they're not on their medication, they don't know.
>
> [DEFENSE]: Well, would you -- you're -- I think that -- that -- let me ask you, would you be able to listen to evidence about the insanity defense and if you believed that [Appellant] . . . was insane at the time of the offense, would you be able to say not guilty by reason of insanity?
>
> [TYLER]: If you prove it to me.
>
> [DEFENSE]: What kind of -- of proof would you be looking for in a -- in an insanity defense, do you know?
>
> Do you have any idea about that?

> [TYLER]: I think that you would have to have an expert witness to testify or something to say that he's insane, something showing that he wasn't on his medication at the time or if he's on medication.
>
> I mean, you have to prove to me that he was insane.
>
> [DEFENSE]: Would we have to prove that to you more than as it was explained to you, more than [by] a preponderance of the evidence?
>
> [TYLER]: I think so.

Defense counsel concluded his voir dire directly thereafter and challenged Tyler for cause based on the exchange set forth immediately above. After hearing the parties' arguments for and against the challenge, the trial court recalled Tyler to the stand and questioned her directly:

> [COURT]: [Y]ou understand that the law requires that they prove [insanity] by a preponderance of the evidence, --
>
> [TYLER]: Yes, right.
>
> [COURT]: -- okay?
>
> And you understand that's the law.
>
> [TYLER]: Right.
>
> [COURT]: Now preponderance of the evidence is not as great a burden as beyond a reasonable doubt.
>
> You understand that?
>
> [TYLER]: (Nods head.)
>
> [COURT]: In fact, one of the attorneys said, you know, 50.1 percent to 49.9 percent, or whatever you want to -- just barely tipping the scale one way or another.

[TYLER]: Right.

[COURT]: That's the burden of proof that the defense has to prove to you . . . [that] the defendant's insane -- [was] insane at the time of the offense.

And when [the prosecutor] was talking to you, you said [y]es, you understood that and you could.

And I think you gave [defense counsel] a different answer, in that you said, well, you would require more of a burden of proof from the defense than a preponderance of the evidence. I mean, [those weren't] your exact words, but that's what you indicated.

Is that the way you feel?

Now that you know what the law is, can you follow the law or would you require them [to meet] a higher burden of proof than the law imposes?

[TYLER]: No, I could follow the law. If he proved that to a certain degree that --

[COURT]: By a preponderance of the evidence.

[TYLER]: Right. That he was insane at the time?

[COURT]: Yeah.

[TYLER]: I could go along with that.

[COURT]: Okay.

[TYLER]: I could follow the law.

The trial court thereafter denied the challenge for cause.

We find no abuse of discretion. To the extent Tyler gave contradictory answers concerning her ability to apply a preponderance standard to Appellant's insanity defense

and whether she would require Appellant to present expert testimony, the trial judge was in the best position to determine whether she would set aside her views and honestly and truthfully follow the juror's oath. *Burks*, 876 S.W.2d at 893. The trial judge was entitled to believe Tyler when she told him that she could and would follow the law; we defer to that belief. *See Gonzales*, 353 S.W.3d at 836 n.7. Point of error twenty-eight is overruled.

I. Sowden

Appellant challenged Sowden on the grounds that she would automatically vote for the death penalty and hold the defense to a higher burden of proof than the law required on the issue of insanity. The trial court did not abuse its discretion by denying Appellant's challenge to Sowden on these grounds.

Regarding the allegation that Sowden would automatically assess the death penalty, Appellant relies on a response she gave during the State's voir dire. He asserts that Sowden stated she would be "inclined" to assess the death penalty if a person were found guilty of a capital murder involving the killings of two people. *See* TEX. PENAL CODE § 19.03(a)(7). Appellant acknowledges that Sowden went on to say that she would listen to all the evidence, but he contends that her initial response reflected her true feelings. We find no abuse of discretion, as the record supports the trial court's ruling.

Before Sowden made the statement at issue, the prosecutor had begun to explain the law concerning capital murder. Sowden stated that she had previously assumed that a capital-murder conviction automatically meant a death sentence. After learning more

about capital-sentencing procedures, however, Sowden denied believing that everyone convicted of capital murder should automatically receive the death penalty, no matter what the punishment-phase evidence might show.

The prosecutor then asked Sowden to assume that she sat on a jury that had found a defendant guilty beyond a reasonable doubt of a capital murder involving the deaths of two people. The prosecutor emphasized that the jury had, therefore, necessarily found that the killings were not accidental, but intentional. He asked Sowden, "And are you automatically going to assess the death penalty or will you listen to the next phase of trial and honestly apply those questions and see where the answer takes you?" Sowden replied, "I might have some idea, but I will listen to the facts," and, "That's what will lead me."

Appellant relies on Sowden's statement, that she "might have some idea," to support his argument that she would automatically assess the death penalty. But the prosecutor continued to question Sowden on this subject and obtained several definitive answers that she would not automatically assess a death sentence. Sowden expressed her belief in the integrity of the sentencing process and her willingness to maintain it, asserting that she could "listen to everything and then . . . make [her] decision on what [she] listened to." When defense counsel asked Sowden what she had meant when she told the prosecutor that she had "some idea," Sowden responded, "Some idea -- what you're talking to me about is I have no facts yet on this case, so that's when I say, I have an idea what I would do, but I cannot tell you until I have all the facts exactly what I will

do." Sowden further explained, "If I have all the facts and I believe someone is guilty, then I will go into it with those beliefs. I won't have an idea at that point. I won't -- it's hard for me to say without knowing all the details." She asserted again that her answers to the special issues would not be automatic: "When I walk in there, I will not say, [t]his person should die. I mean, it could be life. I mean, when I step into the second part of this -- after I hear everything, I can tell you."

The entirety of Sowden's voir dire shows that she made several unequivocal assertions that she would not automatically vote for a death sentence but would consider all the evidence and follow the law. To the extent any of her answers on that issue were unclear or ambiguous, the trial court was in the best position to evaluate her demeanor and responses. *Davis*, 329 S.W.3d at 807. We defer to the trial court's ruling.

We next turn to Appellant's contention that Sowden would hold Appellant to a higher burden of proof on the insanity determination. During the State's voir dire, the prosecutor explained the concept of legal insanity and Appellant's burden of proof. Sowden stated that she could find Appellant not guilty by reason of insanity if he proved insanity by a preponderance of the evidence. Sowden also stated that she could find Appellant not guilty by reason of insanity on the testimony of one or several witnesses, so long as the testimony convinced her by a preponderance of the evidence that Appellant was insane at the time of the offense.

During Appellant's voir dire, defense counsel also asked Sowden whether, if the

defense proved insanity by a preponderance of the evidence through one witness, she would have a problem finding Appellant not guilty by reason of insanity. Sowden answered that she "would factor it in, certainly." After explaining the preponderance standard again, counsel repeated the question. Sowden responded, "If I believe that person is a credible witness. I mean, if that person speaks to me in a manner that I believe that person, then yes, I will believe he's insane."

Defense counsel argued that Sowden's use of the word "credible" and her intonation when saying it meant that she would elevate Appellant's burden of proof. Noting that credibility was part of the preponderance standard's definition, the trial judge denied the challenge. We find no abuse of discretion, as we have defined preponderance of the evidence as the greater weight of credible evidence that would create a reasonable belief in the truth of the claim. *See Druery v. State*, 412 S.W.3d 523, 540 (Tex. Crim. App. 2013). Further, the trial judge was in the best position to evaluate Sowden's demeanor and responses. *Davis*, 329 S.W.3d at 807. Point of error thirty is overruled.

J. Evans

Defense counsel challenged Evans for cause on three grounds: (1) she would automatically assess the death penalty, (2) she could not consider evidence about genetics in answering the mitigation special issue, and (3) she did not understand and could not follow the law regarding Appellant's preponderance burden on insanity. The trial court did not abuse its discretion in denying Appellant's challenges for cause to Evans.

Counsel based his first two reasons for challenging Evans on her juror questionnaire answers. Counsel argued that, although Evans stated during voir dire that she would change her questionnaire answers now that she had been educated about the law, her demeanor led him to believe that she still held the views expressed in her questionnaire and could not follow the law. Appellant does not direct us to any instance from Evans's voir dire in which she indicated that she understood the law, but she held contrary personal views that she could not set aside, nor does our review reveal any. As to her demeanor during voir dire when questioned about these issues, the trial judge was in the best position to evaluate it, and we defer to his determination. *Id.*

Regarding the challenge related to his burden of proof on the insanity determination, Appellant relies on an exchange that occurred during the defense's voir dire. When the prosecutor initially defined legal insanity and explained Appellant's preponderance burden of proof, Evans stated that she could find Appellant not guilty by reason of insanity if the defense proved insanity by a preponderance of the evidence, even if the evidence came through one witness. Evans also stated that she would not hold Appellant to a higher burden than the preponderance standard. Near the end of Appellant's voir dire, defense counsel also defined legal insanity and explained Appellant's burden of proof. Counsel then gave Evans a hypothetical in the following exchange:

> [DEFENSE]: Okay. If whatever evidence was brought to you, even if it was by one person, and the State did prove -- I mean the defense, excuse me, I

misstated. -- the defense proved this defense of insanity by a preponderance of the evidence, your verdict would be what?

[EVANS]: If the State did prove?

[DEFENSE]: No, I misstated.

[EVANS]: I mean if the defense did prove?

[DEFENSE]: Let's start over, okay?

[EVANS]: Okay.

[DEFENSE]: Because I think I screwed it up. I explained the burden of proof. This table has the burden of proof on insanity.

[EVANS]: Okay.

[DEFENSE]: The burden of proof is by a preponderance of the evidence. If we, by one witness or whatever the witness says, and you believe this witness by a preponderance of the evidence and the defense has met that burden in your mind, what would your verdict be or what would you vote for?

[EVANS]: I guess the insanity one?

[DEFENSE]: Uh-huh. You could find somebody not guilty by reason of insanity?

[EVANS]: Yes.

Defense counsel argued that Evans's demeanor during the foregoing exchange was "very inquisitive," as if she "wasn't sure" and wanted someone to tell her how to respond. The State countered that it had been clear that Evans was simply confused due to defense counsel's initial misstatement. The trial judge, who was in the best position to assess Evans's demeanor and responses, denied the challenge. We defer to his decision. *Id.* Point

of error thirty-one is overruled.

K. Matthews

Defense counsel argued that Matthews "hesitated" during voir dire questioning, which indicated that she could not follow the law on insanity and would hold the defense to a higher burden than the law required. Appellant directs us to Matthews's response when the prosecutor asked whether she could find Appellant not guilty by reason of insanity based on the testimony of one witness. Although Matthews answered, "Yes," the prosecutor indicated that he perceived some hesitation in her response. When he asked whether the hesitation was because the decision would be distasteful, Matthews answered, "No," but stated that "it [would] take great pondering." She continued, "It's not going to be a quick decision, in other words."

The trial court did not abuse its discretion in denying the challenge for cause. Matthews's reference to "pondering" and subsequent clarification did not unequivocally establish an inability to follow the law. *See Moore*, 999 S.W.2d at 407. Moreover, when questioned by the defense regarding her ability to find Appellant not guilty by reason of insanity on a preponderance of the evidence, Matthews again asserted that she could do so. Matthews's voir dire sufficiently supports the trial court's ruling. *See Davis*, 329 S.W.3d at 807. Point of error thirty-two is overruled.

L. Adair

Defense counsel raised three challenges for cause to Adair, all of which the trial

court denied. We find no abuse of discretion.

First, defense counsel argued that Adair would automatically vote for the death penalty. Defense counsel acknowledged that, during the State's voir dire, Adair had indicated that he could and would follow all the law applicable to sentencing, but defense counsel asserted that, during the defense's voir dire, Adair "differentiated and went back and forth and vacillated on his true feelings," such that counsel believed Adair's "true opinion [was] that if somebody kills somebody, that they deserve to die."

After reviewing Adair's entire voir dire, we disagree that he took positions during defense questioning that were materially different than the answers he gave during the State's questioning. But even if we were to accept Appellant's argument, we give particular deference to the trial court's ruling when a prospective juror vacillates or gives equivocal or contradictory answers concerning his ability to follow the law. *Gardner*, 306 S.W.3d at 295.

Second, defense counsel argued that Adair would hold Appellant to a higher burden of proof than the law required regarding insanity. Defense counsel based his assertion on Adair's response when the prosecutor questioned him about his answer to Question 38 of the juror questionnaire. Question 38 informed potential jurors that a person with mental illness can receive life without parole or the death penalty for committing capital murder, then asked for the juror's thoughts. Adair wrote, "Life without parole no death penalty on a person with mental illness." The prosecutor

questioned Adair as follows:

> [PROSECUTOR]: First of all, would you agree with me that anyone can just claim they have a mental illness?
>
> [ADAIR]: Yes.
>
> [PROSECUTOR]: Okay. Would you agree with me that mental illness exists on a range of very mild, like a person with mild depression, all the way up to severe where a person just doesn't even understand the difference between right and wrong?
>
> [ADAIR]: Right.
>
> [STATE]: Okay. Now, are you saying to me that, no matter what the extent of the mental illness is, that you'll never consider the death penalty, or are you saying if they are on a far end of that scale that you wouldn't consider it?
>
> [ADAIR]: No, on a far end.

This line of questioning and Adair's "far end" response concerned a punishment issue rather than the affirmative defense of insanity. Appellant identifies nothing else in Adair's voir dire suggesting that he would elevate the burden of proof regarding the insanity determination, and we find nothing in our independent review.

Third, defense counsel asserted that Adair's testimony when questioned about his written response to Question 17 of the questionnaire showed that he would require any evidence of remorse to come through Appellant's testimony. Question 17 asked jurors what would be important to them in deciding whether a person received a death sentence rather than a life sentence in a capital-murder case. In pertinent part, Adair indicated that a lack of remorse would be significant to him.

The prosecutor informed Adair that a defendant has a constitutional right not to testify and that if the defendant elects not to testify, a juror may not hold that choice against him. Adair stated that he could and would follow the law. When defense counsel questioned Adair, counsel noted his mention of remorse in response to Question 17. Defense counsel asked whether Adair would require a defendant "to actually testify and say, look, I'm sorry I did that, or something like that, in the punishment stage?" Adair said that he would not, but he struggled to explain:

> No, I think the remorse would -- I don't know if that's a state of mind or it goes along with like their moral [culpability]. I think it's, you know, like they have no feeling when they do it, you know, like they are not remorse[ful] about killing another human being.

Defense counsel then suggested that a defendant's testimony might be the only way for him to provide evidence of remorse:

> [DEFENSE]: Okay. Do you see where I'm coming from? To actually -- I mean the way we give information to each other is either through, you know, some kind of gesture, words, or writings.
>
> [ADAIR]: Right, right, right. I guess --
>
> [DEFENSE]: And, so, I guess my question is, you know, how would you receive the information about if a person was remorseful, you know, if you didn't require him to testify or give you some information about remorse, like I'm sorry or something?
>
> [ADAIR]: I guess explaining through the act of violence, I guess that would be --
>
> [DEFENSE]: Are you saying that, during the act of violence, they would have to say, I'm sorry, or something like [that]?

> [ADAIR]: No, just, or their mental, trying to say their state of mind at the time of doing the crime.
>
> [DEFENSE]: Okay. I guess I'm confused. I am totally confused in that sense.
>
> [ADAIR]: I'm a little confused myself.

When defense counsel again asked Adair to explain how one would know whether someone was remorseful or not, Adair responded, "I guess through their actions, maybe you could tell. I don't know, if they were crying or I guess however you could tell whether they are remorse[ful] or not."

It was within the trial court's discretion to deny Appellant's challenge for cause. The proponent of a cause-based challenge must show that the challenge is proper and does not meet this burden until, among other things, he demonstrates that the law was explained to and understood by the venire member. *Davis,* 329 S.W.3d at 807. When the prosecutor explained a defendant's constitutional right not to testify, Adair stated that he could and would follow the law. When defense counsel discussed the topic, it was in the context of how jurors could ascertain whether a defendant felt remorse. Defense counsel did not explain to Adair that jurors could determine whether a defendant felt remorse at the time of the offense by drawing reasonable inferences from circumstantial evidence presented at trial. *See Snowden v. State*, 353 S.W.3d 815, 823 24 (Tex. Crim. App. 2011). Rather, it seems that counsel inaccurately implied through his questions that only the defendant, by testifying, could supply such evidence. Despite the apparent misdirection,

Adair evinced an understanding that circumstantial evidence may provide a basis for inferring remorse. Appellant points to nothing in the record to show that Adair could not or would not consider such circumstantial evidence, if it were offered, or that he would require evidence of remorse to come from Appellant himself. Point of error thirty-four is overruled.

M. Koshy and Newton

Because Appellant received two additional peremptory strikes, he can demonstrate harm only by showing that the trial court erroneously denied at least three of his challenges for cause to the seventeen veniremembers at issue in points of error eighteen through thirty-four. *See Chambers*, 866 S.W.2d at 23. We have reviewed Appellant's challenges for cause to fifteen of those potential jurors and found no error by the trial court. Accordingly, even if we assume that the trial court erred in denying Appellant's challenges for cause to the two remaining veniremembers at issue, Koshy and Newton, Appellant cannot show harm on appeal. *See id.* Points of error nineteen and twenty are overruled.

VIII. VOIR DIRE—REMAINING POINTS OF ERROR

In point of error thirty-five, Appellant alleges that the trial court erred by not permitting defense counsel to ask venire member Morgan about the types of evidence she might consider mitigating. During the State's voir dire, the prosecutor explained to Morgan that jurors must be able to consider all of the evidence, including evidence of the

victims' experience of the offense, when answering the mitigation special issue. *See* Art. 37.071, § 2(e)(1). When questioning Morgan, defense counsel referred to the State's point about considering the victims' perspective. Defense counsel asserted that evidence concerning the victims' experience of the offense could have mitigating or aggravating value. Defense counsel asked Morgan if she could foresee circumstances in which such evidence could be mitigating. After Morgan responded that she could, defense counsel asked her to give examples, at which point the State successfully objected.

We review a trial court's ruling that limits voir dire questioning for an abuse of discretion. *Hernandez v. State*, 390 S.W.3d 310, 315 (Tex. Crim. App. 2012). Appellant acknowledges that we have previously held that questions such as the one defense counsel posed are improper. *See id.* ("Whether a juror considers a particular type of evidence to be mitigating is not a proper area of inquiry."). To the extent Appellant argues that our precedent is inconsistent with the holding of *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), we disagree. *Lockett*'s holding requires that the sentencer in a capital case not be precluded from considering, as a mitigating factors, any aspect of the defendant's character, record, or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Id.* at 604. We see nothing in *Lockett* that permits a defendant to ask a prospective juror the kind of question that Appellant sought to ask Morgan. The trial court did not abuse its discretion. Point of error thirty-five is overruled.

In point of error thirty-six, Appellant alleges that the trial court erred during voir

dire when it allowed the prosecutor to misstate the law concerning the future-dangerousness special issue. The alleged misstatements occurred during the State's questioning of veniremembers Johnlouis and Evans.

The future-dangerousness special issue requires jurors to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071, § 2(b)(1). The record shows that the prosecutor focused on the implications of the words "would" and "threat" in the special issue. The prosecutor asserted that the future-dangerousness special issue asks jurors to consider what threat the defendant's "mere existence" would pose, even assuming the possibility that he "would sit in his cell every day and never commit a criminal act of violence." Alternatively, the prosecutor explained that the special issue asks jurors to consider whether the defendant "would" commit criminal acts of violence that would constitute a continuing threat to society, "if he could." After the prosecution rephrased the question, the trial court overruled Appellant's objections that the prosecutor's statements still misstated the law.

We have previously construed the future dangerousness issue as focusing on an individual's character for violence and his internal restraints, rather than merely the external restraints of incarceration and likelihood of incapacitation. *See*, *e.g.*, *Coble*, 330 S.W.3d at 268 69; *Estrada v. State*, 313 S.W.3d 274, 281 82 n.5 (Tex. Crim. App. 2010). The prosecutor's statements were generally consistent with this. Accordingly, we

conclude that the trial court acted within its discretion in overruling Appellant's objections. Further, the record shows that neither Johnlouis nor Evans served on Appellant's jury. Thus, even if we were to determine that error occurred, it did not affect Appellant's substantial rights. *See* TEX. R. APP. P. 44.2(b). Point of error thirty-six is overruled.

IX. CONSTITUTIONAL CHALLENGES TO ARTICLE 37.071

In point of error thirty-seven, Appellant argues that Article 37.071, section 2(f)(4), violates the Eighth and Fourteenth Amendments to the United States Constitution because it limits the jurors' consideration to evidence that implicates the defendant's moral blameworthiness. In point of error thirty-eight, Appellant asserts that Article 37.071 violates the Eighth and Fourteenth Amendments because it does not provide a burden of proof regarding the mitigation special issue. In point of error thirty-nine, Appellant contends that the "10-12" provision found in Article 37.071, sections 2(d)(2) and (f)(2), violates the Eighth and Fourteenth Amendments because it misleads the jury. In point of error forty, Appellant alleges that Article 37.071, section 2(f)(4), violates the Eighth Amendment because it does not require the jury to consider mitigating evidence, and for the same reason, the trial court's jury instruction pursuant to Article 37.071, section 2(f)(4), also violated the Eighth Amendment. In point of error forty-one, Appellant contends that Article 37.071, section 2(a), violates the Eighth and Fourteenth Amendments because it prohibits the jury from being informed about the consequences of

a single holdout juror. In point of error forty-two, Appellant asserts that Texas's capital sentencing scheme violates the Supreme Court's holding in *Ring v. Arizona*, 536 U.S. 583 (2002). In point of error forty-three, Appellant avers that Article 37.071, section 2(b)(1), violates the Eighth and Fourteenth Amendments because it does not define the terms "probability," "continuing threat to society," "criminal acts of violence," and "continuing threat." In point of error forty-four, Appellant alleges that Article 37.071 violates the Supreme Court's holding in *Bush v. Gore*, 531 U.S. 98 (2000), because it does not provide a method by which the state determines a defendant's death-worthiness.

Appellant acknowledges that we have previously rejected claims identical to points of error thirty-seven through thirty-nine and forty-one through forty-three. *See, e.g.*, *Coble*, 330 S.W.3d at 296; *Williams*, 301 S.W.3d at 694; *Roberts v. State*, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007). Although Appellant fails to mention controlling precedent from this Court, we have previously rejected the claims he raises in points of error forty and forty-four. *See, e.g.*, *Lucero v. State*, 246 S.W.3d 86, 102 (Tex. Crim. App. 2008); *Saldano v. State*, 232 S.W.3d 77, 108 09 (Tex. Crim. App. 2007). Appellant's arguments do not persuade us to revisit these issues. Points of error thirty-seven through forty-four are overruled.

We affirm the judgment of the trial court.

Hervey, J.

Delivered: February 25, 2015

Do Not Publish